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Supreme Court of the United States

OCTOBER TERM, 1957

No. 16

ANDREW J. NELSON, INC., APPELLANT,

vs.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, ADVANCE TRANSPORTATION CO., INC., ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS

FILED AUGUST 31, 1956
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[fol. 3]

IN THE UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

Civil Action

ANDREW G. NELSON, INC., Plaintiff,

v.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, Defendant.

COMPLAINT—Filed December 12, 1955

1. This action is one to enjoin, set aside, annul and suspend an order of the Interstate Commerce Commission hereinafter referred to as the "Commission". Jurisdiction is conferred upon this Court by Title 28, United States Code, Section 1336.

2. This proceeding involves the interpretation, application and meaning of Part II of the Act to Regulate Commerce (49 U.S.C.A. 301 et seq.), commonly called the Motor Carrier Act; the rights and privileges inuring to Plaintiff by reasons of the provisions of said Act and particularly Section 209 thereof; and the measure and extent of the power of the Commission, under Sections 204(c) and 212 (a) of said Act to restrict, limit or affect rights granted to plaintiff by said Section 209.

3. Plaintiff institutes this proceeding for the purpose of annulling, vacating, setting aside and suspending a report dated March 17, 1955 and an order dated March 17, [fol. 4] 1955 of Division 5 of the Commission in a proceeding before the Commission entitled "Andrew G. Nelson, Inc., Investigation of Operations," Interstate Commerce Commission Docket MC-C-1610, and to enjoin enforcement thereof. Said report, together with the report of the presiding examiner, is reported in Volume 63 of the Commission's Motor Carrier Reports at page 407 thereof.

4. Plaintiff is an Illinois corporation, incorporated in the year 1951 and existing since said date. Its principal office is in Chicago, Illinois. It is the holder of authority required by law to operate, within the area named in said authority, as a contract carrier by motor vehicle, of commodities as described therein. It is the successor in interest to Andrew G. Nelson an individual, and its rights, powers and privileges are derived as follows:

(a) On December 30, 1935, one Andrew G. Nelson, an individual, of Chicago, Illinois, duly filed with the Commission, in the form and manner, and within the time, provided by law, his application for the issuance to him of "grandfather rights", i.e., a permit to continue the operations in which he had been engaged up to that time as a contract carrier by motor vehicle of the commodities and within the area described therein. Thereafter on February 14, 1938, pursuant to said application, and to the evidence offered in support thereof, and following personal inspection of applicant's properties and operations by authorized agents [fol. 5] of the Commission, the Commission as required by law, duly made its findings of fact, as follows:

"After due investigation:

"It appearing, That applicant in accordance with the requirements of Section 209, Motor Carrier Act, 1935, including due service, made application for a permit to operate as a contract carrier by motor vehicle according to the specification set forth as appended *on the reverse side hereof or attached hereto*, and made a part of this order, and that the said applicant or predecessor in interest was in bona fide operation in such manner on July 1, 1935, and has so operated since that time; and the Commission so finding; therefore . . ."

(b) Concurrently with such finding of fact the Commission duly entered its order as follows:

"It is ordered, That upon full compliance with the requirements of Sections 215 and 218 of the said Act, and the rules and regulations prescribed by the Commission thereunder, *governing the filing of contract* *carrier rate publications and filing and approval of evidence of security for the protection of the public, and with the requirements established in Contracts of Contract Carriers*, 1 M.C.C. 628, *a permit shall be issued*, unless otherwise ordered, authorizing said applicant to engage in interstate or foreign commerce, as a contract carrier by motor vehicle according to the specification *set forth as appended on the reverse side hereof or attached hereto*, and made a part of this order."

(c) The said finding and order are hereto attached as Exhibit "A", and made a part hereof.

(d) Upon the "reverse side" of said finding and order, attached hereto as Exhibit "A", appeared the following language:

"Application of Andrew G. Nelson, Doing Business as Nelson Warehouse and Express Co., Chicago, Illinois.

"The business of applicant, as authorized by the order of which this is a part, in interstate or foreign commerce as a contract carrier by motor vehicle of the commodities indicated, over irregular routes, is as specified below:

[fol. 6] "*New and used store fixtures, new and used household goods*, and *stock* in trade of drug stores.

"Between points and places in Illinois, Indiana, Iowa, Kentucky, Michigan, Minnesota, Missouri, Nebraska, Ohio, and Wisconsin."

(e) Thereupon it was the duty of the Commission, under section 209(a) of Part II of the Interstate Commerce Act, to issue to the said Andrew G. Nelson a permit as a contract carrier by motor vehicle as inclusive and as broad in scope with respect to both territory served and commodities carried as the above finding of the Commission as to his operation as such contract carrier by motor vehicle on July 1, 1935.

(f) Thereafter and within the time specified in said order the said Andrew G. Nelson fully complied with all the requirements of said order, and on March 13, 1942 the Commission duly issued to him the permit, a copy of which is attached hereto and made a part hereof as Exhibit "B".

(g) Thereafter, in 1951, the said Andrew G. Nelson caused to be organized the Corporation which is plaintiff in this proceeding, and transferred said permit to plaintiff in the form and manner required by law. The Commission thereupon approved said transfer and on June 18, 1951, reissued such permit, making no change therein save the substitution of plaintiff's name for the name of the original holder. The original permit, so amended, has been continuously in effect since March 13, 1942, and is still in full force and effect.

[fol. 7] 5. (a) On January 21, 1954, the Interstate Commerce Commission, proceeding on its own motion without complaint having been filed, instituted a proceeding entitled "Andrew G. Nelson, Inc.,—Investigation of Operations," to which it assigned its Docket No. MC-C-1610. After reciting the terms of the said permit, the said order instituting the said proceeding provided in part:

> "*It further appearing*, That said Andrew G. Nelson, Inc., has been and is transporting as a contract carrier by motor vehicle in interstate commerce between points and places in the above-described area various commodities not within the scope of the commodity description,
>
> * * * * * * * *
>
> "*It is ordered*, That an investigation be, and it is hereby instituted under authority of section 204(c) and section 212(a) of the Interstate Commerce Act, with a view to determining whether Andrew G. Nelson, Inc. is and has been engaged in the transportation of commodities not within the scope of its operating authority . . ."

A copy of said order of January 21, 1954 is attached hereto as Exhibit "C" and made a part hereof.

(b) Pursuant to said order, on May 20 and 21, 1954, a hearing was held in Chicago, Illinois. Said hearing was followed by a proposed report of the hearing Examiner to which plaintiff on October 29, 1954, duly filed its exceptions and requested oral argument thereon before the Commission. On December 13, 1954, the Commission entered its order refusing to hear oral argument, and on March 17, 1955 Division 5 of the Commission made and entered its decision and order, which are hereto attached and made a [fol. 8] part hereof as Exhibits "D" and "E", respectively.

(c) Thereafter, on May 11, 1955, within the time provided by the Commission's rules, plaintiff duly filed its petition for reopening of the proceeding, for reconsideration of the decision of Division 5 by the entire Commission and for other purposes. Pursuant to plaintiff's request, and during consideration of plaintiff's petition, the Commission from time to time postponed the effective date of the order attached hereto as Exhibit "E", the last extension of said order having been made on November 15, 1955 and having extended the effective date of said order to December 30, 1955.

(d) On December 5, 1955 there was served upon attorney for plaintiff an order theretofore entered by the Commission on November 15, 1955 denying plaintiff's aforesaid petition of May 11, 1955 for reconsideration and oral argument, a copy of which order is attached hereto and made a part hereof as Exhibit "F".

(e) Unless stayed, suspended or set aside by order of this Court the Commission's said order of March 17, 1955 will become effective on December 30, 1955 with consequent irreparable injury to plaintiff as hereinafter set forth.

(f) Wherefore, plaintiff has exhausted its administrative remedies before the Commission before instituting this proceeding.

6. The aforesaid report and order of the Commission, here challenged, are contrary to law and exceed any power conferred upon the Commission in that said report and [fol. 9] order would deprive plaintiff of rights conferred upon plaintiff by Section 209(a), Part II, of the Interstate Commerce Act, which rights the Commission has no power or authority to withdraw or withhold from plaintiff and which rights plaintiff and its predecessors have lawfully and properly enjoyed and exercised as aforesaid since prior to July 1, 1935.

7. The aforesaid report and order of the Commission are null and void and contrary to law in that they would diminish plaintiff's authority as a contract carrier to a scope substantially less than the scope of the operations in which the Commission found by its aforesaid order of February 14, 1938 (Exhibit "A" hereto) that plaintiff's predecessor was engaged on July 1, 1935.

8. The said order of the Commission challenged herein is null and void and contrary to law in that it is based upon an expressed erroneous conclusion by the Commission that the scope of the "grandfather rights" of plaintiff which were found by the Commission in its aforesaid order of February 14, 1938, and to which plaintiff was and is entitled by operation of law were irrelevant and not to be considered by the Commission in making the said order herein challenged.

9. The said order of the Commission, herein challenged, is null and void for the further reasons that the report upon which it is based is erroneous and defective in the following respects:

(a) The said report contains no finding reflecting the fact that on February 14, 1938, the Commission made a finding of fact, as required by law, concerning the scope of [fol. 10] the operations of plaintiff's predecessor on and prior to July 1, 1935, and at all times after July 1, 1935, up to and including February 14, 1938, although plaintiff is entitled as a matter of law to an authority as a contract carrier at least as broad in scope as the said findings of the Commission made on February 14, 1938.

(b) The said report of the Commission contains no finding of fact from which it can be determined what rights became vested in plaintiff as a matter of law by reason of the provisions of Section 209, Part II, of the Interstate Commerce Act, although said Section required the Commission to issue a permit, "without further proceedings," to an applicant who was in bona fide operation as a contract carrier by motor vehicle on July 1, 1935.

(c) The said report of the Commission contains no finding of fact supporting or tending to support the order of the Commission which purports to limit the persons to whom or for whom plaintiff may transport commodities, although the Commission has not challenged, and the said report of the Commission concedes that plaintiff has the basic right to transport commodities and to contract freely with any person for the transport of commodities, and although neither the Commission's finding in its order of February 14, 1938 concerning plaintiff's "grandfather rights" nor the permit issued to plaintiff contains any limitation with respect to the persons to whom or for whom plaintiff may transport commodities.

(d) The said report of the Commission, by reducing [fol. 11] plaintiff's authority as a contract carrier to a substantially lesser scope than was found by the Commission's order of February 14, 1938 to be the scope of operation of plaintiff's predecessor, is erroneous in that (1) it can be based only upon the conclusion that the Commission in issuing a permit to plaintiff's predecessor violated its statutory duty by failing or refusing to grant a permit coextensive with plaintiff's predecessor's "grandfather rights", whereas it should be presumed that the Commission acted in a manner consistent with law and granted to plaintiff's predecessor the authority to which it was entitled by law by virtue of its "grandfather rights", (2) it contains no finding of fact as to the scope and extent of the "grandfather rights" of plaintiff's predecessor in interest and in the absence of any such finding the basis or reasons for the Commission's order cannot be ascertained, (3) it contains inconsistent and conflicting conclusions which render it impossible to ascertain the basis of or reasons for the said decision and order of the Commission, one conclusion contained in said report being to the effect that the intent of the Commission at the time of issuance of the permit is "the important determination here," and another being that the intent of the Commission at such time was not of "any importance."

10. The report and order of the Commission, here challenged, are null and void for the reason that the Commission failed to make findings or conclusions upon material and relevant issues of fact, among others, in the following respects:

[fol. 12] (a) Although the Commission's order of February 14, 1938 found that plaintiff's predecessor on or prior to July 1, 1935, had been engaged as a contract carrier by motor vehicle in the transportation of commodities indicated by three generic descriptions, to-wit: "New and used store fixtures, new and used household goods, and stock-in-trade of drug stores," the Commission made no findings with respect to any description except "stock-in-trade of drug stores." In the absence of such finding the scope and effect of the Commission's order is not ascertainable, and the basis or reasons therefor cannot be determined.

(b) The Commission failed to find that the term "household goods" which is contained in plaintiff's permit has been construed by the Commission after extended hearings, to include the "property of stores . . ., or other establishments when a part of the stock, equipment or supply of such stores . . . or other establishments." A copy of the Commission's said definition of the term "household goods" is hereto attached as Exhibit "G" and made a part hereof. Neither the report nor order of the Commission makes any reference, finding or conclusion with respect to whether any article named in the Commission's aforesaid order of January 21, 1954 was or was not included in plaintiff's authority to haul "new and used household goods" and "new and used store fixtures."

(c) There is nothing in the report or order of the Commission from which it can be determined whether the proposed vague limitation sought to be placed upon plaintiff [fol. 13] by the Commission applies also to the transportation of "new and used store fixtures" and "new and used household goods" as well as to "stock-in-trade of drug stores."

11. The report and order of the Commission here challenged are arbitrary and unreasonable and null and void in that under said report and order there is no means by which plaintiff can or could determine whether a particular transportation service is lawful or unlawful before, at or during the course of such transportation. Under the limitation apparently sought to be imposed by the Commission the legality or illegality of a transportation service could

not be ascertained or determined until after the transportation has been completed and the property has passed beyond plaintiff's knowledge and custody.

12. The report and order of the Commission here challenged are contrary to law and are null and void because said report and order constitute a decision of the Commission within the meaning of the Administrative Procedure Act (Title 5, U.S.C., Sec. 1001 et seq.) and the same do not include a statement of findings and conclusions, as well as the reasons or basis therefor, upon all the material issues of fact, law, or discretion presented on the record, and the same do not include an appropriate order of sufficient clarity to be susceptible of compliance or enforcement contrary to and in violation of the said Administrative Procedure Act.

13. The Commission erred as a matter of law and was arbitrary in failing to give consideration to and in failing [fol. 14] to sustain exceptions filed by plaintiff as aforesaid to the recommended report of the Commission's hearing examiner.

14. The report and order of the Commission here challenged are contrary to law and null and void in that they:

(a) Ignore and fail to decide appeals taken to *to* the Commission at the time of hearing from rulings made by the presiding examiner on questions of law and fact.

(b) Fail to state the issues correctly, and they ascribe to plaintiff contentions which were never made by plaintiff and positions which were never taken by plaintiff.

(c) Fail to state or decide important issues of law and fact existing in the proceedings before the Commission.

15. The order of the Commission here challenged is erroneous, contrary to law and null and void because the report upon which it is based contains no findings or conclusions upon many material issues of both law and fact and leaves in doubt or undecided many issues of law and fact. Among other material questions and issues of law and fact left in doubt or undecided in said report or as to which said report contains no reasons or basis for findings or conclusions are the following:

(a) Whether plaintiff's permit is ambiguous or unambiguous.

(b) Whether evidence of facts existing before the issuance of plaintiff's permit was received and considered, notwithstanding plaintiff's motion to strike and exclude such evidence.

[fol. 15] (c) Whether plaintiff's motion to strike certain evidence offered by the Commission concerning matters prior to the Commission's order of February 14, 1938 (Exhibit "A" hereto attached) was sustained or denied.

(d) Whether the Commission sustained or denied plaintiff's direct and specific appeal to the Commission from the ruling of the hearing examiner which deprived plaintiff of the opportunity to know whether the term "household goods" in plaintiff's permit (Exhibit "B" hereto) was to be interpreted in accordance with the Commission's established interpretation of that term (Exhibit "G" hereto).

16. The said order of the Commission here challenged is contrary to law, erroneous and null and void for the reason that plaintiff was not accorded a fair and impartial hearing in the proceedings which led to said order in the following respects:

(a) The Commission prejudged the issues to be determined by it in its order of January 21, 1954.

(b) The Commission failed and refused to consider or give weight to evidence, facts, and law supporting plaintiff's position.

(c) Subsequent to the Commission's said order of January 21, 1954 (Exhibit "C" hereto), plaintiff filed in writing with the Commission its motion to make the order more definite and certain in certain respects stated therein so that plaintiff might be informed before the hearing as to the charges against which it must defend. Pursuant to said motion, on the day prior to the commencement of the hearing and at the opening of the hearing, counsel [fol. 16] for the Commission advised plaintiff's counsel that it was and would be the contention of the Commission that the language of plaintiff's permit was ambiguous. By reliance upon such information plaintiff was induced to make no objection to the introduction of evidence concerning matters existing prior to the issuance of plaintiff's permit, and plaintiff offered under protest, evidence, asserted by plaintiff to be irrelevant, concerning the operations of plaintiff's predecessor in interest on and prior to July 1, 1935. When the Commission rested its case without offering evidence to show, and without making any claim that plaintiff's permit was ambiguous in its terms, plaintiff moved to strike all evidence bearing upon the operations of plaintiff's predecessor at and prior to the statutory date of July 1, 1935, which motion was denied. By misleading plaintiff as to the issues to be presented and claims to be made by the Commission, the Commission induced plaintiff to offer under protest evidence obtainable from no other source upon which the Commission purported to rely in its report here challenged which evidence was irrelevant and immaterial, if plaintiff's permit is clear and unambiguous in its terms.

17. The report and order of the Commission here challenged are erroneous, contrary to law and null and void for the reason that they are so vague, indefinite and confusing that they fail to apprise plaintiff as to what it should and should not do to comply with said order and are susceptible neither of compliance nor enforcement.

18. On or about March 31, 1953, Harold E. Nelson, President [fol. 17] of the plaintiff corporation, and Albert C. Peters, Secretary and Treasurer of the plaintiff corporation, purchased the entire capital stock of the plaintiff corporation and paid therefor the sum of $27,500. The only asset of said corporation of any value was the said permit to operate as a contract carrier in interstate commerce and the said Harold E. Nelson and Albert C. Peters purchased the stock of the plaintiff corporation as aforesaid in reliance upon the findings of fact as to plaintiff's "grandfather rights" contained in the Commission's aforesaid compliance order of February 14, 1938 (Exhibit "A" hereto) and in reliance upon the aforesaid permit.

19. Since March 31, 1953 plaintiff has expended large sums of money soliciting business, advertising and in other promotional efforts. Plaintiff has in the course of its busi-

ness as a contract carrier by motor vehicle approximately 42 contracts for the transportation of commodities and is and has been performing transportation service pursuant to said contracts. During the year ended October 1, 1955 plaintiff collected by reason of its operations as a contract carrier gross revenues in excess of $800,000. Of said gross revenues during said year approximately 95% resulted from transportation of commodities commonly found for sale in drug stores as part of their stock in trade but which commodities were transported for eventual use or sale in establishments other than drug stores. If plaintiff's right to transport commodities described as stock in trade of drug stores is limited to the right to transport said commodities only when at the time of their movement they are [fol. 18] or are intended to become stock in trade of drug stores, plaintiff's large and profitable business will be destroyed and will be diverted to plaintiff's competitors and the value of plaintiff's "grandfather" permit will virtually disappear and plaintiff will suffer extreme and irreparable damage.

20. Plaintiff has exhausted its administrative remedies, has no remedy at law by which to prevent the aforesaid destruction of its business or to recover the aforesaid monetary loss and has no recourse except through this proceeding.

Wherefore, plaintiff prays:

(1) That upon the filing of this complaint, the Judge of this Court call to his assistance two other judges, one of whom shall be a Circuit Judge; that this Honorable Court examine the record before the Commission and determine whether or not the order of the Commission of March 17, 1955 is warranted by said record and is valid in law.

(2) That this Court order, adjudge and decree that the said Report and Order of the Commission dated March 17, 1955 are beyond the authority of said Commission; are violative of plaintiff's statutory rights, are legally insufficient for failure to contain findings and conclusions and the reasons or basis therefor upon all material issues of fact and law; are vague, indefinite and confusing, and not sus-

ceptible of enforcement or compliance; are without warrant in law or fact and are null and void; and that said Report and Order be set aside and annulled.

(3) That this Court stay or suspend the operation of the [fol. 19] said Order of the Commission pending the final hearing and determination of this action.

(4) That this Court grant to plaintiff herein an interlocutory order setting aside and enjoining the enforcement of said Order of March 17, 1955 of the Commission and any and all further proceedings thereunder and that such interlocutory order continue in force until further order of this Court.

(5) That upon final hearing this Court make and enter a decree and order herein annulling, setting aside and enjoining the said Order of said Commission and permanently enjoining the enforcement thereof.

(6) That plaintiff have such other and further relief in the premises as to the Court shall seem meet and just and as equity may require.

Paul E. Blanchard, William F. Price, Victor L. Lewis, Attorneys for Plaintiff, 105 South La Salle Street, Chicago 3, Illinois.

Paul E. Blanchard, 406 Albee Bldg., Washington, D. C. William F. Price, Victor L. Lewis, Vedder, Price & Kaufman, 105 S. La Salle Street, Chicago 3, Illinois.

[fol. 20] EXHIBIT "A" TO COMPLAINT

ORDER

At a Session of the INTERSTATE COMMERCE COMMISSION, Division 5, held at its office in Washington, D. C., on the 14th day of February, A. D. 1938

No. MC 1194

APPLICATION OF ANDREW G. NELSON, DOING BUSINESS AS NELSON WAREHOUSE AND EXPRESS CO., CHICAGO, ILLINOIS

After due investigation:

It appearing, That applicant in accordance with the requirements of Section 209, Motor Carrier Act, 1935, including due service, made application for a permit to operate as a contract carrier by motor vehicle according to the specification *set forth as appended on the reverse side hereof or attached hereto*, and made a part of this order, and that the said applicant or predecessor in interest was in bona fide operation in such manner on July 1, 1935, and has so operated since that time; and the Commission so finding; therefore

It is ordered, That upon full compliance with the requirements of Sections 215 and 218 of the said Act, and the rules and regulations prescribed by the Commission thereunder, *governing the filing of contract carrier rate publications and filing and approval of evidence of security for the protection of the public, and with the requirements established in Contracts of Contract Carriers*, 1 M.C.C. 628, a permit shall be issued, unless otherwise ordered, authorizing said applicant to engage in interstate or foreign commerce, as a contract carrier by motor vehicle according to the specification *set forth as appended on the reverse side hereof or attached hereto*, and made a part of this order.

It is further ordered, That in all other respects the said application shall be, and it is hereby, denied, *and that on and after 30 days from date of this order*, unless on the Commission's own motion or for good cause shown it is otherwise ordered, applicant shall not engage in any motor carrier operations not described herein or otherwise lawfully authorized.

It is further ordered, That in the event said applicant has not complied with the requirements herein *within 30 days from date of this order,* then said applicant shall show cause, if any there be, *within 60 days from the date of this order,* why said application should not be dismissed, failing in which the said application shall be dismissed without further proceedings.

And it is further ordered, That if applicant or any other party in interest desires to protest the issuance of such permit, such applicant or party in interest shall file with the Commission *within 30 days from the date of this order,* a petition setting forth the grounds relied upon in opposing the granting of such authority and requesting that the issuance of the said permit be withheld pending further investigation and order by the Commission. Otherwise such protests shall be denied.

By the Commission, division 5.

W. P. BARTEL,
Secretary.

(SEAL.)

[fol. 21] Appendix to the order of the P-26

INTERSTATE COMMERCE COMMISSION, Division 5, dated the 14th day of February, A. D. 1938

No. MC 1194

APPLICATION OF ANDREW G. NELSON, DOING BUSINESS AS NELSON WAREHOUSE AND EXPRESS CO., CHICAGO, ILLINOIS

The business of applicant, as authorized by the order of which this is a part, in interstate or foreign commerce as a contract carrier by motor vehicle of the commodities indicated, over irregular routes, is as specified below:

New and used store fixtures, new and used household goods, and *stock* in trade of drug stores,

Between points and places in Illinois, Indiana, Iowa, Kentucky, Michigan, Minnesota, Missouri, Nebraska, Ohio, and Wisconsin.

[fol. 22] EXHIBIT "B" TO COMPLAINT P-30-1

PERMIT

No. MC 1194

ANDREW G. NELSON,
DOING BUSINESS AS NELSON WAREHOUSE & EXPRESS CO.,
CHICAGO, ILLINOIS

At a Session of the INTERSTATE COMMERCE COMMISSION, Division 5, held at its office in Washington, D. C., on the 13th day of March, A. D. 1942

AFTER DUE INVESTIGATION, It appearing that the above-named carrier has complied with all applicable provisions of the Interstate Commerce Act, and the requirements, rules, and regulations prescribed thereunder, and, therefore, is entitled to receive authority from this Commission to engage in transportation in interstate or foreign commerce as a motor carrier; and the Commission so finding;

IT IS ORDERED, That the said carrier be, and it is hereby, granted this Permit as evidence of the authority of the holder to engage in transportation in interstate or foreign commerce as a contract carrier by motor vehicle; subject, however, to such terms, conditions, and limitations as are now, or may hereafter be, attached to the exercise of the privileges herein granted to the said carrier.

IT IS FURTHER ORDERED, That the transportation service to be performed by the said carrier in interstate or foreign commerce shall be as specified below:

New and used store fixtures, new and used household goods, and *stock* in trade of drug stores, over irregular routes,

Between points and places in Illinois, Indiana, Iowa, Kentucky, Michigan, Minnesota, Missouri, Nebraska, Ohio, and Wisconsin.

AND IT IS FURTHER ORDERED, That this permit shall be effective from the date hereof and shall remain in effect until suspended, changed, or revoked as provided in said Act.

By the Commission, division 5.

W. P. BARTEL,
Secretary.

(SEAL.)

[fol. 23] EXHIBIT "C" TO COMPLAINT

ORDER

At a Section of the INTERSTATE COMMERCE COMMISSION, Division 5, Held at its office in Washington, D. C., on the 21st day of January, A. D. 1954.

No. MC-C-1610

ANDREW G. NELSON, INC.—INVESTIGATION OF OPERATIONS

It appearing, That in Docket No. MC-1194, Andrew G. Nelson, Inc., a corporation, of Chicago, Ill., was issued a permit by this Commission on June 18, 1951, authorizing the transportation, over irregular routes, of:

New and used store fixtures, new and used household goods, and stock in trade of drug stores,

Between points in Illinois, Indiana, Iowa, Kentucky, Michigan, Minnesota, Missouri, Nebraska, Ohio, and Wisconsin.

It further appearing, That said Andrew G. Nelson, Inc., has been and is transporting as a contract carrier by motor vehicle in interstate commerce between points and places in the above-described area various commodities not within the scope of the commodity description, *including* beer for Blatz Brewing Company, a brewery of Milwaukee, Wis., to beer distributors; malt liquors for A. K. Gortz Brewing Company, a brewery of St. Joseph, Mo., to beer distributors, wines for C V A Corp., a wine house of Chicago, Ill., to wine distributors; canned pickles, preserves, jam, jelly, fish and fruit juices for Glaser Crandall Company, a wholesale food company of Chicago, Ill., to wholesale, retail, and chain grocery stores; cleaning compounds for Linco Products Company of Chicago, Ill., to wholesale, retail, and chain grocery stores; fibreboard boxes for Dairypak, Inc., a manufacturer of such products at Cleveland, Ohio, to milk packaging companies; canned meat and dog food for Armour & Company, a meat packing company of Chicago, Ill., to wholesale, retail, and chain grocery stores; cabinets, lockers and storage wardrobes for Morton Manufacturing Company of Libertyville, Ill., a manufacturer of such products, to wholesale and retail furniture and department stores, candy for Funkle Company of Kenton, Ohio, a candy manufacturer, to wholesale and retail stores; dry milk products from Algona Coop Creamery Co. of Algona, Ia., to wholesale and retail grocery and food stores; canned vegetables for Topco Associates, Inc. of Green Bay and Oakfield, Wisc., to wholesale, retail, and chain grocery stores, and storage batteries for Montgomery Ward Company of Chicago, Ill., to its retail outlets in other cities; and good cause appearing therefor.

It is ordered, That an investigation be, and it is hereby, instituted under authority of Section 204(c) and Section 212(a) of the Interstate Commerce Act, with a view to determining whether Andrew G. Nelson, Inc. is and has been engaged in the transportation of commodities not within the scope of its operating authority, in violation of Section 209(a) of said Act, or of any requirement, restriction, term, or condition of said permit, and to issuing such orders and taking such other action as the facts and circumstances may appear to warrant; and *upon the failure of Andrew G. Nelson, Inc. to comply with any such order*, to conduct a further proceeding to determine whether the said permit issued to Andrew G. Nelson, Inc. should be suspended or revoked.

[fol. 24] *It is further ordered*, That Andrew G. Nelson, Inc. be made a respondent in this proceeding, that a copy of this order be served upon it and that notice of this proceeding be given to the public by posting a copy of this order in the office of the Secretary of the Commission at Washington, D.C., *And it is further ordered*, That this proceeding be set for hearing at such time and place as may hereafter be specified.

By the Commission, Division 5.

GEORGE W. LAIRD,
Secretary.

(SEAL)

[fol. 25]

EXHIBIT "D" TO COMPLAINT

INTERSTATE COMMERCE COMMISSION

No. MC-C-1610

ANDREW G. NELSON, INC.—INVESTIGATION OF OPERATIONS

Submitted December 13, 1954. *Decided March 17, 1955.*

Respondent found to be engaged in transportation not authorized by its permit and not to be in compliance with the requirements of section 209(a) of the Interstate Commerce Act. Cease and desist order entered.

Paul E. Blanchard and *Milton E. Diehl* for respondent.

James A. Murray, Hugh E. Lillie, James Y. Piper, and *Thomas J. Delaney* for Bureau of Inquiry and Compliance, Interstate Commerce Commission.

Eugene L. Cohn, Bernard G. Colby, Ovid Crouch, Claude G. Metzler, Joseph M. Scanlon, Carl L. Steiner, and *Glenn W. Stephens* for interveners in support of the investigation.

REPORT OF THE COMMISSION

DIVISION 5, COMMISSIONERS CROSS, TUGGLE, AND HUTCHINSON

BY DIVISION 5:

Exceptions were filed by respondent to the order recommended by the examiner, and certain interveners and the Bureau of Inquiry and Compliance, Interstate Commerce Commission, hereinafter referred to as the Bureau, replied. Respondent's exceptions are nine in number. It excepts: (1) to the alleged fragmentary and incomplete statements of fact in the report of the examiner, specifically as regards those historical facts relating to the original "grandfather" application and the so-called "compliance order" which constituted a step in the informal processing of the application of respondent's predecessor-in-interest culminating in the issuance of the assailed permit; this exception is premised on a conclusion that the terms of the permit are ambiguous; (2) to the examiner's statement of the issue to be "a determination of the extent of the authority granted by the commodity description '*stock* in trade of drug stores' ", it being respondent's position that the sole issue relates to whether the permit contains a so-called "Keystone" restriction, limiting the persons whom respond- [fol. 26] ent may serve to a certain class of shippers; (3) to the alleged inconsistency between the examiner's finding that "*stock* in trade of drug stores relates to stock kept for sale purposes by one who operates a drug store, and the position of the Bureau that the intended use test is applicable here, it being respondent's contention that if the examiner's interpretation is correct the permit would allow only the movement from one shelf to another in the same store rather than a movement which is unrestricted so long as it is earmarked for eventual delivery to, and sale in a drug store as the Bureau urges, (4) to the examiner's refusal to accept respondent's interpretation of the term "*stock* in trade of drug stores" as meaning "commodities described as stock in trade of drug stores", it being respondent's contention that such refusal is equally critical of the previously noted compliance order, entered herein; respondent argues that the compliance order must be examined to determine whether or not the permit effectuates that order; (5) to the examiner's selection of the particular dictionary definitions of the word "of", in his interpretation of the term "stock in trade *of* drug stores," claiming that his choice is designed to suit the objective of the Bureau; it argues that there are many other definitions of the word "of" which make equally as much sense as the one adopted by the examiner connoting possession and ownership; (6) to the examiner's alleged failure to point out that this permit was issued subsequent to the determination by this Commission that a permit may be restricted to a certain class of shippers, in the face of which the permit in question was not so limited, it being argued that the "Keystone" restriction could have been inserted in the permit but was not, and cannot now be read into the authority; it urges further that the Commission abandoned the intended use test in the report in *Vidàs Contract Carrier Application*, 62 M.C.C. 106, which decision, it alleges, is controlling here; (7) to the al- [fol. 27] leged failure of the examiner to point out that respondent's permit embraces authority to transport "new and used household goods", the scope of which has already been spelled out and defined by the Commission, and that under such definition respondent has authority to transport almost every article, from every consignor to every consignee, named in the investigation order, regardless of the scope of consignee or consignor coverage included in the term "*stock* in trade of drug stores". It is respondent's position that the Commission's definition of "household goods" in *Practices of Motor Common Carriers of Household Goods,* 17 M.C.C. 467 authorizes it to transport "*property of stores* * * * when *part of the stock, equipment or supply* of such stores * * * ", without restriction of any kind; (8) to the inclusion in the report of the discussion of our power to revoke a permit and the procedure by which such action is to be accomplished, it being contended that such discussion has no relevancy here; and (9) to the examiner's reference to the number of opposing motor carriers and associations thereof, and rail carriers, charging this was an attempt unduly to inflate the degree of opposition to respondent; it claims that much of the opposition was "nominal" and that relatively few motor carriers were serious in their support of the Bureau.

In reply certain interveners support the findings and conclusions of the examiner except that they would place an even more limited interpretation on the term "stock in trade." They urge now, as they did at the hearing, that under trade usage and practice, such term does not include all commodities that a drug store may have for sale purposes. In particular they would exclude such commodities as storage batteries, cabinets, lockers, canned vegetables, pickles and similar articles, which they assert are known in the trade as "drug sundries" rather than "stock in trade". The Bureau and certain other interveners support the findings and conclusions of the examiner and urge [fol. 28] that they be sustained.

We agree with the contention of the parties and the examiner's conclusion that there is no such patent ambiguity in the permit as to warrant going back of it and giving consideration to events prior to its issuance. This obviates the necessity for consideration of respondent's first and fourth exceptions which are premised on such events.

As to the second and seventh exceptions, we are of the opinion that the examiner's statement and discussion of the issue is sound as regards the phrase "*stock* in trade of drug stores". Involved also, however, is a determination of the extent of authority granted by the terms "*new and used store fixtures*" and "new and used household goods". It appears that examiner's omission of a statement regarding these terms stems from the fact that at the hearing respondent did not appear seriously to contend that such terms authorized it to conduct the operations to which the investigation order made reference. Even on exceptions no question is raised as to the meaning of the term "*new and used store fixtures*", which is adequately defined in *Shelinsky Common Carrier Application*, 52 M.C.C. 349, at 359, where division 5 said:

> "In our opinion, a motor carrier authorized to transport 'store fixtures' is limited to such items as showcases, counters, tables, floor cabinets, wall cases and other items of similar utility."

and in *Mural Trucking Service Interpretation of Certificate*, M.C.C. , decided November 15, 1954, where, in interpreting the term "store fixtures and store equipment", division 5 stated:

> "Petitioners' operations, although not actually limited to the transportation of shipments moving to stores * * *, are, nevertheless, strictly limited to the transportation of commodities which at the time of the transportation are intended for such use."

Respondent's contention with respect to the meaning of "household goods" is totally without merit. Any article which is a part of the stock in trade of a mercantile estab- [fol. 29] lishment does not for that reason come within the meaning of "household goods", except as an incident of the movement of such establishment from one location to another. See *Barnett Extension of Operations—Furniture*, 44 M.C.C. 587, *Shapiro Extension*—Shuffleboards, 49 M.C.C. 634, and *North American Van Lines, Inc., Extension—New Furniture*, 49 M.C.C. 368.

As to the third exception, we do not agree that an inconsistency exists between the intended use test and the examiner's statement that "*stock* in trade of drug stores" means stock kept for sale purposes by one who operates a drug store. The definition is valid and points, in our opinion, to the obvious equivalent of the description in the permit, which is "drug stores' *stock* in trade", as the examiner concluded. The important determination here, as in all such inquiries, is what transportation was intended to be authorized by this language of the permit. In *C & H Transp. Co. Inc., Interpretation of Certificate*, 62 M.C.C. 586, division 5 concluded that authority to transport "contractors' equipment and supplies" authorizes the transportation of all forms of equipment and supplies which are at the time of movement intended for use by a contra-tor, and further that when the controlling use is established, the commodity may be transported for or to anyone, and the identity of the shipper or consignee is not important except as it may tend to establish or confirm the intended use. The similarity between the phrase there interpreted and "*stock* in trade of drug stores" or its equivalent, "drug stores' *stock* in trade", is readily apparent, and no good reason has been advanced for a conclusion here, different from that in the case just cited.

The fifth exception raises no question not disposed of in our discussion of the third and need not be further considered.

The sixth, eighth, and ninth exceptions are without merit. [fol. 30] As to the sixth, no attempt has been made to read into respondent's permit a "Keystone" restriction. The commodity limitation in its permit does not limit the class or type of persons with whom it may contract as would a "Keystone" restriction. Further, respondent's argument that the intended use test has been abandoned by the Commission is fallacious. True it was found inapplicable in the *Vidas* case, supra, but it remains valid and has been found applicable in proceedings more recent than *Vidas*. See *C & H Transp. Co. Inc., supra*, and *Mural Trucking Service-Interpretation of Certificates, supra*. As to the eighth, respondent, itself, in its brief raised certain questions as to the procedure by which a permit might be revoked, and in his report the examiner clarified the matter. Moreover, the order instituting this investigation specified that this action was taken under sections 204(c) and 212(a) of the Interstate Commerce Act, the latter section dealing, among other things, with our power to revoke or suspend operating authorities. As to the ninth, suffice it to point out that the examiner correctly indicated the support of interveners which the Bureau has in this proceeding, and that of the "nominal" opposition to which respondent refers, briefs and replies to respondent's exceptions herein were filed on behalf of 17 motor carriers and an association of motor carriers.

We are unable to agree with the contention of certain interveners that "stock in trade" has a more limited meaning than that advanced by the examiner, although we do agree that cognizance of trade usages may be taken in determining proper construction of terms used in authorities. In any event, it is of no moment in the instant proceeding as the conclusion does not depend on such determination.

We have given full consideration to respondent's exceptions and the replies thereto and find that except as modified herein the examiner has adequately stated the [fol. 31] facts and conclusions on the issues in the report hereinafter set forth which accompanied his recommended order. With respect to that portion of the permit primarily in issue, namely, the phrase reading "*stock* in trade of drug stores", we agree with the conclusion of the examiner that to the extent respondent is transporting commodities which at the time of their movement are not, or are not intended to become, part of the stock in trade of a drug store, such operations are in excess of its authority and are in violation of section 209 of the act and should be discontinued. In the circumstances we adopt his report and findings as our own. An appropriate order requiring respondent to cease and desist from the operations found to be unauthorized will be entered.

REPORT OF THE EXAMINER

By order entered January 21, 1954, the Commission, division 5, instituted this investigation with a view to determining whether Andrew G. Nelson, Inc., hereinafter called respondent, is and has been engaged in the transportation of commodities not within the scope of its operating authority, in violation of section 209(a) of the Interstate Commerce Act, or of any requirement, restriction, term, or condition of its permit. The order further provided for the issuance of such orders and the taking of such other action as the facts and circumstances may appear to warrant, and that upon the failure of respondent to comply with any order issued herein, to conduct a further proceeding to determine whether the respondent's permit should be suspended or revoked.

The matter was referred to the examiner for hearing and the recommendation of an appropriate order thereon. Hearing was held in May 1954, at Chicago, Ill. The Bureau of Inquiry and Compliance, of the Commission, hereinafter called the bureau, was joined in its support of the investigation by 19 motor carriers, 3 associations of motor carriers, and the class I rail carriers in western territory.

The respondent operates under the authority of permit No. MC-1194, which was issued on March 13, 1942 pursuant to a "grandfather" application filed on January 2, 1936. The permit was issued in the name of Andrew G. Nelson, doing business as Nelson Warehouse & Express Co., Chicago, Ill., and provided for transportation service in interstate or foreign commerce as specified below:

New and used store fixtures, new and used household goods, and *stock* in trade of drug stores, over irregular routes,

Between points and places in Illinois, Indiana, Iowa, Kentucky, Michigan, Minnesota, Missouri, Nebraska, Ohio, and Wisconsin.

Subsequently, by order dated March 12, 1951, the Commission in No. MC-FC 53070 authorized transfer of the aforesaid operating rights to Andrew G. Nelson, Inc., and the permit was transferred by order dated June 18, 1951. [fol. 32] The sole stockholder was Andrew G. Nelson, the original applicant, and on April 1, 1953, he sold his stock to the present operators.

The bureau introduced evidence showing that in 1953 during the period July 31 to December 16, the respondent transported in interstate commerce the following commodities from consignors, *none of whom were drug stores*, to the consignees whose business is as indicated: Numerous and varied canned or packaged grocery items to grocery stores or warehouses; dry and liquid cream and fruit juices to food manufacturers; beer and wines to liquor distributors; 100-pound bags of dry glue to a company whose business is not stated of record; candy to a wholesale candy distributor; dry milk to a distributor of that product; malted milk powder and milk food to a manufacturer of drugs and dietetic foods; and automobile batteries to a general merchandising company. It was also shown by the bureau that in the period from April 24, 1951 to April 1, 1953, the respondent entered into 14 contracts with shippers, and that 32 contracts were signed by the new stockholders in the first 8 months of their management.

Although some of the commodities transported by respondent might be questioned as to whether they constitute part of the stock in trade of a drug store, the bureau does not raise such question. Instead, it contends that the authority to transport "*stock* in trade of drug stores" permits only the transportation of commodities which at the time are part of the stock in trade of a drug store, or are intended for eventual use as the stock in trade of a drug store. Thus, the bureau's ultimate contention is that the respondent's permit restricts transportation to authorized commodities moving to or from a drug store, or to or from a warehouse or other repository when such commodities are earmarked for eventual use as the stock in trade of a drug store.

The respondent contends that the description "*stock* in trade of drug stores" permits transportation from and to any consignor and consignee, provided of course that the commodities transported are the same as those sold in drug stores. It is asserted by respondent that the permit does not include any language restricting the transportation to a particular or specified class of consignees.

The sole issue herein is thus explicit and requires a determination of the extent of the authority granted by the commodity description "*stock* in trade of drug stores." None of the parties claim that such description is patently ambiguous, and ambiguity may not be assumed merely from the fact that the bureau and interveners are in disagreement with respondent as to the meaning of the description. In considering the issue thus presented neither the operations of respondent prior to the "grandfather" date, nor the Commission's intentions with respect thereto in issuing the permit, are of any importance.

The principal contention on behalf of the respondent with respect to the term "*stock* in trade of drug stores" is that such description unequivocally grants authority to transport "commodities described as stock in trade of drug stores". It is then argued that the latter description is obviously unrestricted as to the class of consignees who may be served by respondent. This argument is completely without merit because it is based on the false premise that the respondent's permit authorizes the transportation of "commodities described as stock in trade of drug stores". As stated before, the issue presented herein [fol. 33] is explicit, namely, a necessary interpretation of the commodity description "*stock* in trade of drug stores". Any arguments as to the authority granted by the description "commodities described as stock in trade of drug stores", clearly change the basic issue and are irrelevant.

An interpretation of the commodity description "*stock* in trade of drug stores", immediately and obviously presents the initial question as to the purpose of the Commission in emphasizing the word stock by underscoring. It will be noted that the other commodity descriptions in the permit, namely, "*New and used store fixtures, new and used household goods*" are completely underscored.

Therefore, the underscoring of only the word "stock" in the description "*stock*" in trade of drug stores" was intentional in order to segregate and emphasize such word within the disputed description. The only possible meaning that can be attached to such segregation and emphasis is that the transportation of "stock", as further defined in the commodity description, is authorized by the permit granted to respondent. The word "stock" in a mercantile sense simply means goods possessed by a merchant or manufacturer. Such goods include articles either for sale or for the possessor's own use. The following words in the description are "in trade" and they modify the word "*stock*" by restricting it to mean only those goods which are kept by a merchant or manufacturer for sale purposes. The subsequent words in the description are "of drug stores" and they further modify and explain the preceding words "*stock* in trade" by limiting them to a particular class of merchant, namely, one who operates a drug store.

The correctness of the above interpretation is apparent if attention is directed specifically to the word "of" in the disputed commodity description. Among the numerous definitions applicable to "of", only that connoting possession or ownership has any sensible meaning as used in respondent's permit. In other words, the commodity description under consideration is merely a different but equally effective manner of stating "drug stores' *stock* in trade". The limitation as thus imposed by the commodity description is not restricted to deliveries to drug stores but, as stated by the bureau, also includes goods which are earmarked for eventual delivery to and sale in a drug store. Accordingly, respondent's past and continued transportation in excess of that granted by its permit, as described herein, is in violation of section 209(a) of the act and should be discontinued immediately.

Although there is no such patent ambiguity in the permit as to warrant consideration of events prior to its issuance to Andrew G. Nelson, the correctness of the interpretation set forth hereinbefore is borne out by an examination of the circumstances under which the permit was issued. A hearing was not held in connection with the "grandfather" application but instead the Commission relied on a signed statement from Nelson, accompanied by delivery receipts showing interstate contract movements for Walgreen Company in the period June 27, 1934–September 21, 1935. The Walgreen Company operates a chain of drug stores throughout the territory respondent is authorized to serve. The statement signed by Nelson contained the following unqualified assertions: "That he is an interstate contract carrier of property for the Walgreen Company and for it alone. That he hauls to and from Walgreen Retail Stores located within 600 miles of Chicago. That said transportation has to do with the opening, the remodeling, and/or the closing of Walgreen retail stores, the commodities so transported are usually store fixtures and equipment and merchandise for the [fol. 34] opening stock." These declarations by Nelson in a signed statement show that he desired only to continue serving retail drug stores of one company. However, the terms of the permit go beyond Nelson's request to the extent that there is no restriction other than territorial in the permit with respect to the transportation of new and used store fixtures and household goods, and the transportation of the stock in trade of drug stores is not limited to only one chain of drug stores as consignees or ultimate users. With the exceptions noted, the permit complies with the transportation that Nelson claimed he was engaged in on the "grandfather" date, and which he wished to continue.

The Commission's power to revoke a permit is circumscribed by express provisions in section 212(a), and is adequately discussed in *Florence Lane-Revocation of Permit*, 52 M.C.C. 427. In that proceeding, the Commission, division 5, said: "* * * a revocation of a permit may be effected only after a notice and hearing and then only for wilful failure to comply with an order issued after a notice and hearing under section 204(c)." Thus two "notices and hearings" are required. Notice and hearing which is the very essence of due process means an opportunity to be heard. In *Dohany* v. *Rogers*, 281 U.S. 362, 369, it is said that the requirements of due process are satisfied so far as procedure is concerned if the person

C

"has reasonable notice and reasonable opportunity to be heard and to present his claim or defense, due regard being had to the nature of the proceeding and the character of the rights which may be affected by it." Section 5 of the Administrative Procedure Act provides, in part:

> (a) NOTICE.—* * * In instances in which private persons are the moving parties, other parties to the proceeding shall give prompt notice of issues controverted in fact or law; and in other instances agencies may by rule require responsive pleading. * * *
>
> (b) PROCEDURE.—The agency shall afford all interested parties *opportunity for (1) the submission and consideration of facts.* * * *. (Emphasis supplied)

Rule 43 of the General Rules of Practice Before the Commission, reads as follows:

> An order instituting an investigation will be served by the Commission upon respondents. If, within a time period stated in that order, *a respondent fails to comply with any requirement specified therein, respondent shall be deemed in default and to have waived any further hearing.* Thereafter the investigation may be decided without further proceedings. (Emphasis supplied)

It is apparent that the statutory requirements of notice and hearing are satisfied if the parties are given a reasonable notice and afforded a reasonable opportunity to be heard, and that in proceedings initiated by an investigation such as here, the Commission may require a responsive pleading respecting the desire of a respondent to an oral hearing, and, in the event respondent fails to comply with this requirement, respondent shall be deemed in default and to have waived its right to such oral hearing. The evidence indicates that respondent will appear at a second hearing in the event of default of the order under section 204(c) entered herein. Nevertheless, in the circumstances here present it is appropriate to call upon [fol. 35] respondent to inform the Commission, in writing, if it desires an oral hearing (above-mentioned second hearing).

The examiner finds that respondent has been and is engaged in the conduct of operations not within the scope of its operating authority, in violation of section 209(a) of the act, and that an order should be entered requiring respondent, within 60 days of the effective date of the order, to discontinue such unlawful operations and thereafter maintain only the operations authorized by its permit and to comply with the provisions of section 209(a) of the act, and within 10 days thereafter inform the Commission in a written statement under oath whether or not compliance has been made therewith.

The examiner further finds that in the event respondent fails, within 60 days of the effective date of the order, to operate only as authorized by its permit and to comply with section 209(a) of the act, it should be required to inform the Commission, in writing, within the time above specified for informing the Commission regarding compliance or non-compliance, if an oral hearing is desired at which to present further evidence as to why the permit should not be revoked, failing in which respondent shall be deemed in default and to have waived such oral hearing and the matter shall be taken under consideration on the facts then of record with a view to the entry of an order revoking its permit if it should be determined that such action is warranted.

[fol. 36] EXHIBIT "E" TO COMPLAINT

ORDER

At a Session of the INTERSTATE COMMERCE COMMISSION, Division 5, held at its office in Washington, D.C., on the 17th day of March, A.D. 1955.

No. MC-C-1610

ANDREW G. NELSON, INC.,—INVESTIGATION OF OPERATIONS

Investigation of the matters and things involved in this proceeding having been made, and the said division, on the date hereof, having made and filed its report herein containing its findings of fact and conclusions thereon, which report is hereby referred to and made a part hereof, and said proceeding having been duly submitted:

It is ordered, That respondent Andrew G. Nelson, Inc., be, and it is hereby, notified and required to cease and desist on or before May 2, 1955, and thereafter to abstain and refrain, unless and until appropriate authority therefor is obtained, from the operations in interstate or foreign commerce found in said report to be unauthorized and unlawful.

By the Commission, division 5.

Harold D. McCoy, Secretary.

(Seal)

[fol. 37] EXHIBIT "F" TO COMPLAINT

ORDER

At a General Session of the INTERSTATE COMMERCE COMMISSION, held at its office in Washington, D. C., on the 15th day of November, A. D. 1955.

No. MC-C-1610

ANDREW G. NELSON, INC.—INVESTIGATION OF OPERATIONS (Chicago, Ill.)

Upon consideration of the record in the above-entitled proceeding, and of:

(1) Petition of respondent for reconsideration and oral argument, dated May 11, 1955;

(2) Reply of the Bureau of Inquiry and Compliance, Interstate Commerce Commission, filed June 15, 1955;

(3) Joint reply of Clairmont Transfer Company, Green Bay-Chicago Lines, Motor Transport Company, Northern Transportation Company, Olsen Transportation Company, Steffke Freight Company and West Shore Express, Inc., interveners, dated May 18, 1955;

(4) Joint reply of Advance Transportation Co., Inc., Austgen Express & Storage Co., Checker Express Co., Commercial Truckers, Cushman Motor Delivery Co., Fred Olson & Son Motor Service Co., Royal Transit, Inc., Service Transport Co., Webber Cartage Line, Inc., West Shore Transport Co., Inc., and Chicago Suburban Motor Carriers Association, Inc., interveners in support of the complaint, filed June 14, 1955;

and good cause appearing therefor:

It is ordered, That said petition be, and it is hereby, denied, for the reasons (1) that the conclusions and findings of Division 5 (now Division 1) herein are sound and are based on all of the relevant facts adduced, and (2) oral argument is unnecessary.

By the Commission.

Harold D. McCoy, Secretary.

(Seal)

[fol. 44] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION.

[Title omitted]

ANSWER OF INTERSTATE COMMERCE COMMISSION—Filed February 10, 1956.

The Interstate Commerce Commission, one of the defendants in the above-entitled action, hereinafter called the Commission, answers the complaint as follows:

I.

Admits the allegations of paragraphs 1, 2, and 3.

II.

Admits the allegations of the first three sentences of paragraph 4, and the allegations of subparagraphs (f) and (g). As to the balance of paragraph 4, including subparagraphs (a), (b), (c), (d) and (e), the Commission admits said allegations, but avers that they are irrelevant, immaterial and not pertinent to the consideration of the issues involved in this action.

III.

Admits all of the allegations of paragraph 5, except that with respect to the last sentence of subparagraph (c) and [fol. 45] with respect to subparagraph (e), the Commission alleges that on December 20, 1955, the Commission further extended the effective date of the order of March 17, 1955 (Exhibit E to the complaint) from December 30, 1955, to March 15, 1956, a copy of which extension order is attached to this answer and marked "Exhibit 1"; and except that the Commission denies the allegation in subparagraph (e) that the order of March 17, 1955, as and when it becomes effective, will result in irreparable injury to the plaintiff.

IV.

Denies the allegations of paragraphs 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, and 17.

V.

Admits the allegations of paragraph 18, but avers that they are irrelevant, immaterial and not pertinent to the consideration of the issues involved in this action.

VI.

Admits the allegations of the first and second sentences of paragraph 19; as to the third and fourth sentences of said paragraph, the Commission neither admits nor denies said allegations, for lack of knowledge, but avers that said allegations are incompetent, irrelevant, immaterial, and not pertinent to the issues involved in this action; and the Commission denies the allegations of the last sentence of said paragraph 19.

VII.

Denies the allegations of paragraph 20, except that the Commission admits that plaintiff has exhausted its administrative remedies.

[fol. 46]

VIII.

For further answer to the allegations in the complaint, the Commission avers that its proceedings in its docket No. MC-C-1610 were warranted by and conducted pursuant to law; that its said orders issued in said proceeding, and the reports issued in connection with them, were within the authority of the Commission and in conformity with all applicable statutory provisions; that the plaintiff was afforded a full and complete hearing before the Commission, in strict conformity to the statutory and constitutional provisions of due process of law; that the report and orders assailed are not vague, indefinite, or confusing and are susceptible of enforcement and compliance; that said assailed report and orders contain appropriate findings and conclusions, which are in turn based upon substantial evidence in the record of the proceeding before the Commission, and that the Commission in issuing said assailed report and orders gave careful consideration to all of the contentions presented to it by the parties to the proceeding, including plaintiff's counsel; and that no statutory or constitutional rights of the plaintiff have been infringed by the action of the Commission in ordering the plaintiff to cease and desist from transporting commodities not within the scope of the plaintiff's permit as a contract carrier by motor vehicle.

IX.

Each and every allegation in the complaint not herein expressly admitted by the Commission is denied.

Wherefore, the Commission prays that the court dismiss the complaint of the plaintiff.

James Y. Piper, Assistant General Counsel, Interstate Commerce Commission, 12th St. & Constitution Ave. N.W., Washington 25, D. C.

Robert W. Ginnane, General Counsel, Of Counsel.

[fol. 47] EXHIBIT 1 TO ANSWER

ORDER

INTERSTATE COMMERCE COMMISSION

Docket No. MC-C-1610

ANDREW G. NELSON, INC.,—INVESTIGATION OF OPERATIONS

IN THE MATTER OF REQUEST FOR FURTHER POSTPONEMENT OF THE EFFECTIVE DATE OF THE ORDER.

PRESENT: J. MONROE JOHNSON, Acting Chairman, to whom the above-entitled matter has been assigned for action thereon.

Upon further consideration of the record in the above-entitled proceeding, and upon consideration of a request from United States District Judge Walter J. LaBuy, of Chicago, Illinois, for postponement of the effective date of the order of March 17, 1955, heretofore entered in this proceeding, containing an effective date of December 30, 1955, and good cause appearing therefor:

It is ordered, That the effective date of the order of the Commission, Division 5, dated March 17, 1955, which, as amended, was to become effective December 30, 1955, be, and it is hereby, postponed from December 30, 1955, to March 15, 1956.

Dated at Washington, D. C., this 20th day of December, A. D., 1955.

By the Commission, Acting Chairman Johnson.

Harold D. McCoy, Secretary.

(Seal)

[fol. 48] CERTIFICATE OF SERVICE (omitted in printing).

[fol. 60] IN THE UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

No. 55 C 2302

ANDREW G. NELSON, INC., Plaintiff,

v.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, Defendant.

Transcript of Proceedings of March 7, 1956

had in the above-entitled cause before Honorable Philip J. Finnegan, Judge of the United States Court of Appeals for the Seventh Circuit, Honorable Walter J. La Buy and Honorable J. Sam Perry, Judges of the United States District Court for the Northern District of Illinois, sitting as a Statutory Three-Judge Court, at Chicago, Illinois, on March 7, 1956 at 11:00 a. m.

APPEARANCES:

Mr. Paul E. Blanchard and Mr. Victor L. Lewis, On behalf of the Plaintiff;

Mr. Richard B. Allen, Assistant United States Attorney; and Mr. James Piper, Assistant General Counsel, Interstate Commerce Commission, Washington, D. C.; and Mr. James Durkin, Department of Justice, Washington, D. C., On behalf of the defendant;

[fol. 61] Mr. Eugene L. Cohn, On behalf of Certain Intervenors;

Mr. Joseph Scanlan, On behalf of Certain Intervenors.

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[fol. 66]

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OFFERS IN EVIDENCE

Mr. Lewis: First, your Honor, we would like to put into evidence, by agreement, I believe, the entire record which has been certified by the Commission, of the proceeding before the Commission in its Docket No. MCC-1610.

Judge Finnegan: No objection to it. Let it be marked and received.

(Said document, so offered and received in evidence, was marked Plaintiff's Exhibit No. 1.)

Mr. Lewis: Also by agreement the entire record certified by the Commission in its proceeding—it was MCC-1194 [fol. 67] which is the original "grandfather" application back in 1935, which is involved here, and also by agreement a certified copy of the present permit of the plaintiff which was issued by the Commission in 1951.

Judge Finnegan: No objection to these?

Mr. Piper: No objection.

Judge Finnegan: Let them all be marked and received.

(Said documents, so offered and received in evidence, were marked, respectively, Plaintiff's Exhibits Nos. 2 and 3.)

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[fol. 70]

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LEON A. JAROSZ, called as a witness on behalf of the plaintiff, having been first duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Lewis:

Q. State your name, please.

A. My name is Leon A. Jarosz.

Judge Finnegan: I didn't get the last name.

The Witness: J-a-r-o-s-z. I live at 300 South Hi-Lusi in Mount Prospect, Illinois.

By Mr. Lewis:

[fol. 71] Q. What is your business or occupation?

A. I am employed by Andrew G. Nelson as an accountant-auditor.

Q. That is the Andrew G. Nelson, Incorporated who is the defendant in this case?

A. Yes, sir.

Q. How long have you been so employed?

A. Since September, 1954.

Q. And are you an accountant by profession?

A. I am an accountant by training, but I am not licensed.

Q. And how long have you been engaged in the accounting business?

A. I am just trying to think back on that, sir. I have done partial bookkeeping, and things like that, probably since about 1940, and then since 1948, when I left the Bureau of Internal Revenue, I went to work for public accounting firms, and I have also done some work on the side for other people.

Judge Finnegan: Now, will you answer the question? Read the question to the witness, please.

(Question read.)

By the Witness:

[fol. 72] A. As I said, I have been employed by Andrew G. Nelson since September, 1954.

Judge Finnegan: Now, that doesn't answer the question. How long have you been in accounting work?

By the Witness:

A. In accounting, I would say on a full time basis since 1948, and prior to that I mean for some short periods on a part time basis as bookkeeper for others.

By Mr. Lewis:

Q. And do you have, then, charge and supervision over the books of account and financial records of Andrew G. Nelson, Incorporated?

A. Yes, sir, I do.

Q. I show you an exhibit here, Mr. Jarosz, which I will ask the reporter to mark as Plaintiff's Exhibits 4 and 5 for identification.

(Documents so marked.)

Did you make up those exhibits from the books and records of the company?

A. Yes, sir, I did.

Q. And are the figures on there true and correct?

A. Yes, sir, as drawn from the books and records of the company.

[fol. 73] Mr. Lewis: If the Court please, to shorten this I would like to offer these in evidence.

Judge Finnegan: Do you have more?

Mr. Lewis: Yes. Those are photostats.

Judge Finnegan: Are there more to identify, or is that all?

Mr. Lewis: No, this is all of this witness.

Judge Finnegan: Is there any objection?

They will be admitted, subject to the objection, if any.

(Said document, so offered and received in evidence were marked, respectively, Plaintiff's Exhibits 4 and 5.).

Mr. Piper: May I call the attention of the Court that in one document here there are items of salary paid to one Byron Elting, and there is no indication as to what relationship Byron Elting has with the plaintiff.

Mr. Lewis: I am going to bring that out by Mr. Nelson, whom I will call as the next witness.

Judge Finnegan: I say they will be admitted subject to any objection that you may have.

Is there any cross examination, anything you want to ask him?

[fol. 74] Mr. Piper: No questions.

Judge Finnegan: Do you want to ask him about Elting?

Cross examination.

By Mr. Piper:

Q. Mr. Jarosz, who is Byron Elting, shown on these exhibits?

A. Mr. Elting is in charge of the Traffic Department, sir.

Q. How long have you been connected with Andrew G. Nelson, Inc.?

A. I was an employee of the firm since September, 1954.

Q. You became an employee then after the hearing that was held in this particular case?

A. Yes, sir. Prior to that I was employed by an accounting firm who did the audits for the company.

Q. And you were not an employee of Andrew G. Nelson at the time the hearing was held, in the Commission proceeding, which is involved in this case?

A. Well, to be frank and positively honest with you, sir, I don't remember the day of the hearing.

Redirect examination.

By Mr. Lewis:

Q. Before you became an employee were you working for [fol. 75] an independent auditor doing the accounting for Andrew G. Nelson, Inc.?

A. Yes, sir.

Q. And was that sometime before the 1st of January, 1954?

A. Yes, sir.

Judge Finnegan: Mr. Witness, you said, as I remember, that you were not licensed, is that right?

The Witness: That's right, sir, I am not.

Judge Finnegan: What do you mean by that?

The Witness: Well, in order to be licensed you have to pass the state C.P.A. examination.

Judge Finnegan: And you are not a C.P.A.?

The Witness: No, sir, I am not.

Judge Finnegan: And that is what you meant by that?

The Witness: That's right, sir.

Judge Finnegan: Is there anything else of this witness? Next witness, please.

(Witness excused.)

Harold E. Nelson, called as a witness on behalf of the [fol. 76] plaintiff, having been first duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Lewis:

Q. State your full name, please.
A. Harold E. Nelson.
Q. Where do you live?
A. 6717 Lightfoot Avenue, Chicago, Illinois.
Q. What is your business, Mr. Nelson?
A. Trucking—interstate trucking.
Q. And are you connected with the plaintiff in this case, Andrew G. Nelson, Incorporated?
A. I am the president of the firm.
Q. How long have you been president?
A. Since April 1, 1953.
Q. Mr. Nelson, would you look, please, at Plaintiff's Exhibits 4 and 5 in evidence?
You have seen those exhibits before, have you?
A. I have.
Q. And you are familiar with them?
A. I am.
Q. Will you tell the Court who Byron Nelson is, and what his business is—or Byron Elting, I mean?
A. Byron Elting is in charge of our traffic and sales. [fol. 77] His primary duty is sales.
Q. And he is a full time employee of the plaintiff?
A. He is a full time employee.
Q. And the salary item for Byron Elting as shown on Exhibit 5 is the salary and expenses paid him in connection with his duties of selling and soliciting business for the plaintiff, is that correct?
A. That is correct.

Judge Finnegan: For what period of time?
The Witness: From July 1, 1953, to December 31, 1955.
Judge Finnegan: Was that during the period when the matter was before the Interstate Commerce Commission?

The Witness: It was during that period and prior to that period.

Judge Finnegan: Prior.

Is that all, sir?

Mr. Lewis: No, I have a couple more questions.

Judge Finnegan: Go ahead.

By Mr. Lewis:

Q. Now, will you look at Exhibit 4, please, Mr. Nelson? If you will look at the adjusted gross income of the plaintiff, Mr. Nelson, on that for the months of May, 1955 and [fol. 78] June, 1955. There is a drop in gross income which is quite substantial.

Can you tell the Court what the reason was for that drop in gross income?

A. After an order issued by Division 5 of the Commission some of my customers ceased giving us freight for a while.

Q. And did the Commission originally fix an effective date of that order as of May 2, 1955?

A. They did.

Q. Now, will you look at the figures, Mr. Nelson, for October, November and December, 1955, and tell the Court, if you know, why there was a substantial decrease in gross income in the months of November and December, 1955?

A. Due to an order by the entire Commission denying us our petition for re-hearing.

Q. As a result of those orders of the Commission did a substantial number of your customers stop giving you business, and refuse to give you business?

A. They did.

Q. Now, Mr. Nelson, referring again to Exhibit 4 for the period October 1, 1954 through December 31, 1955, the total gross income of the plaintiff was $952,881.

Will you tell the Court what percentage of that gross income was derived from the transportation of commodities [fol. 79] which are commonly held for sale in drug stores, but which at the time of transportation you or the plaintiff, or anyone connected with the plaintiff, did not actually know were destined for ultimate sale in a drug store?

A. Oh, I would say 95 per cent.

Judge Finnegan: Mr. Nelson, why wasn't this evidence presented to the Interstate Commerce Commission at the hearing?

The Witness: Your Honor, I couldn't answer that question.

Judge Finnegan: Did you have this information at that time?

The Witness: We have had this information at all times.

Judge Finnegan: At all times.

Mr. Lewis: Well, some of these figures are since the proceedings before the Commission, your Honor, but of course, we could not anticipate what order the Commission was going to issue, and therefore we could not at that time show to the Commission irreparable damage and deprivation of property without due process, which we are entitled to show to the Court.

[fol. 80] Judge Finnegan: Don't you have to put in your whole case before the Commission like you do in court?

Mr. Lewis: No, sir. We are here showing irreparable damage to the Court, and we are entitled to protection of the Court on our irreparable damage.

Judge Finnegan: Go ahead.

By Mr. Lewis:

Q. Now, were some of these goods for which you received part of this gross income of over $900,000 during that period, goods which in your opinion would come under the commodity classification of "new and used household goods"?

A. Yes.

Q. And can you tell me whether there were any, and if so, approximately what percentage of goods which could be classified as "new and used household goods" from which you derived part of this gross income, which at the time of the movement were not known to the plaintiff here, to be moved incidentally to the movement of a store from one location to another?

Judge Finnegan: That is kind of a complicated question, [fol. 81] isn't it?

The Witness: Very.

Judge Finnegan: I don't understand that myself.
Mr. Lewis: Read the question, please.

(Question read.)

Judge Finnegan: Do you understand the question?
The Witness: Well, I think I can answer it.
Judge Finnegan: Go ahead.

By the Witness:

A. According to my interpretation of the Commission's definition of "household goods" all of these items would consist of household goods that we had moved.

By Mr. Lewis:

Q. Now the question is, Mr. Nelson, did you move any goods that you considered household goods, incidental to the movement of a store from one location to another?
A. No.
Q. No part of it was that?
A. No.

Mr. Lewis: I think that is all, your Honor.
Judge Finnegan: Any cross examination?

Cross examination.

[fol. 82] By Mr. Piper:

Q. Mr. Nelson, you said that your interpretation of the Commission's definition of "household goods" would result in all of the transportation involved in this proceeding being under the classification of "household goods"?
A. Under my understanding of the Commission's determination of "household goods" I can transport stock, furniture or supplies of an organization.
Q. And some of the transportation involved here are, let's say, ten to fifteen tons of beer in a truck load; is that considered household goods in your interpretation?
A. It is part of the stock of an organization.
Q. Isn't it a fact, Mr. Nelson, that at the hearing before the Commission there was testimony to the effect that 95 per

cent of the transportation that your performed would be prescribed by this Commission's order? Wasn't there testimony given in the hearing before the Commission, giving the same figures?

A. I don't recall.

Mr. Lewis: The record is in evidence. That will speak for itself. I don't recall that it was in there.

Judge Finnegan: Is there anything else, sir?

Mr. Piper: Nothing further.

(Witness excused.)

[fol. 139] SECRETARY'S CERTIFICATE TO DOCUMENTS IN NO. MC-C-1610 (omitted in printing).

[fol. 141] ORDER

At a Session of the INTERSTATE COMMERCE COMMISSION, Division 5, held at its office in Washington, D. C., on the 21st day of January, A. D. 1954.

No. MC-C-1610

ANDREW G. NELSON, INC.—INVESTIGATION OF OPERATIONS

It appearing, That in Docket No. MC-1194, Andrew G. Nelson, Inc., a corporation, of Chicago, Ill., was issued a permit by this Commission on June 18, 1951, authorizing the transportation, over irregular routes, of:

New and used store fixtures, new and used household goods, and stock in trade of drug stores,

Between points in Illinois, Indiana, Iowa, Kentucky, Michigan, Minnesota, Missouri, Nebraska, Ohio, and Wisconsin.

It further appearing, That said Andrew G. Nelson, Inc., has been and is transporting as a contract carrier by motor vehicle in interstate commerce between points and places in the above-described area various commodities not within the scope of the commodity description, including beer for

Blatz Brewing Company, a brewery of Milwaukee, Wis., to beer distributors; malt liquors for M. K. Goetz Brewing Company, a brewery of St. Joseph, Mo., to beer distributors; wines for C.V.A. Corp., a wine house of Chicago, Ill., to wine distributors; canned pickles, preserves, jam, jelly, fish and fruit juices for Glaser Crandall Company, a wholesale food company of Chicago, Ill., to wholesale, retail, and chain grocery stores; cleaning compounds for Linco Products Company of Chicago, Ill., to wholesale, retail, and chain grocery stores; fibreboard boxes for Dairypak, Inc., a manufacturer of such products at Cleveland, Ohio, to milk packaging companies; canned meat and dog food for Armour & Company, a meat packing company of Chicago, Ill., to wholesale, retail, and chain grocery stores; cabinets, lockers and storage wardrobes for Morton Manufacturing Company of Libertyville, Ill., a manufacturer of such products, to wholesale and retail furniture and department stores; candy for Runkle Company of Kenton, Ohio, a candy manufacturer, to wholesale and retail stores; dry milk products from Algona Coop Creamery Co. of Algona, Ia., to wholesale and retail grocery and food stores; canned vegetables for Topco Associates, Inc. of Green Bay and Oakfield, Wis., to wholesale, retail, and chain grocery stores; and storage batteries for Montgomery Ward Company of Chicago, Ill., to its retail outlets in other cities; and good cause appearing therefor:

It is ordered, That an investigation be, and it is hereby, instituted under authority of Section 204(c) and Section 212(a) of the Interstate Commerce Act, with a view to determining whether Andrew G. Nelson, Inc. is and has been engaged in the transportation of commodities not within the scope of its operating authority, in violation of Section 209(a) of said Act, or of any requirement, restriction, term, or condition of said permit, and to issuing such orders and taking such other action as the facts and circumstances may appear to warrant; and upon the failure of Andrew G. Nelson, Inc. to comply with any such order, to conduct a further proceeding to determine whether the said permit issued to Andrew G. Nelson, Inc. should be suspended or revoked;

[fol. 142] *It is further ordered*, That Andrew G. Nelson, Inc. be made a respondent in this proceeding, that a copy of this order be served upon it and that notice of this proceeding be given to the public by posting a copy of this order in the office of the Secretary of the Commission at Washington, D. C.;

And it is further ordered, That this proceeding be set for hearing at such time and place as may hereafter be specified.

By the Commission, Division 5.

George W. Laird, Secretary.

(Seal)

[fol. 149] BEFORE THE INTERSTATE COMMERCE COMMISSION

Docket No. MC-C-1610

In the Matter of:

ANDREW G. NELSON, INC.—INVESTIGATION OF OPERATIONS

Stenographer's Minutes—May 20, 1954

Room 705, Custom House,
610 South Canal Street,
Chicago, Illinois.
Thursday, May 20, 1954.

Met, pursuant to notice, at 9:30 o'clock a.m.

Before: William J. Sweeney, Examiner.

APPEARANCES:

Hugh E. Lillie, 610 S. Canal Street, Chicago 7, Illinois, appearing for the Bureau of Law, Interstate Commerce Commission.

Paul E. Blanchard, 406 Albee Bldg., Washington, D.C., appearing for Andrew G. Nelson Inc., Respondent.

Milton E. Diehl, 1003 Munsey Bldg., Washington 4, D.C., appearing for Andrew G. Nelson Inc., Respondent.

Joseph M. Scanlan, 111 West Washington St., Chicago 2, Illinois, appearing for Lee Brothers, Inc. Intervening in support of the Commission.

Eugene L. Cohn, 1 North LaSalle St., Chicago, appearing for Chicago Surburban Motor Carriers Association, Inc.; Advance Transportation Co.; Austgen Express & Storage Co.; et al. intervenors in support of Complaint of the Commission.

[fol. 150] Claude G. Metzler, 888 Union Station, Chicago 6, Illinois, appearing for Class I Western Rail Carriers, intervenors in support of Complaint.

Ovid Crouch, Transport Bldg., St. Joseph, Missouri, appearing for Crouch Bros. Inc., intervenor in support of Complaint.

Glenn W. Stephens, 121 W. Doty St., Madison 3, Wisconsin, appearing for Green Bay-Chicago Lines; Olson Transport Co.; Northern Trans. Co., et al, intervenors in support of the Complaint.

Carl L. Steiner, 39 S. LaSalle St., Chicago 3, Illinois, appearing for Illinois-Minnesota Motor Carriers Conference and Middle West-Eastern Seaboard Motor Carriers Conference, Intervenors in support of the Complaint.

[fol. 153]

* * * * * * *

Exam. Sweeney: Now do you wish to make a statement, Mr. Blanchard, and perhaps Mr. Lillie will wish to make one?

STATEMENT BY MR. BLANCHARD

Mr. Blanchard: Mr. Examiner, last Friday in the early afternoon I personally took to the Commission a motion asking the Commission to make its Order which originated this case more definite and certain respects specifically named in that motion.

I returned to my office and half an hour after I was back, I received a letter which Mr. Lillie, counsel for the Commission, had mailed to my client and which my client had forwarded to me which had satisfied some of the uncertainties [fol. 154] I pointed to in the *the* Order. I reached Chicago Monday morning and immediately conferred with Mr. Lillie and I think the record should show that that letter did, and the conference with Mr. Lillie, seasonably advise the Respondent as to the uncertainty set forth in the motion and that, therefore, there is only a small fragment of the motion on which we are relying from now on.

The motion sets forth four uncertainties:

First, it is related that we are not advised by the Order whether our unlawful operation consists of a departure from the territorial restrictions in the permit or the commodity restrictions. Mr. Lillie advised me very promptly Monday that there would be no contention that we had violated the territorial restrictions. That was due notice which enabled us to prepare our defenses on that point.

The second point that the Order did not state which of the five possible violations named in the Order we were going to have to meet, and that some interpretation of the permit must have been made by the Commission in order to determine that any one of those violations had occurred.

At the conference Monday Mr. Lillie directly talked interpretation of the permit, that the permit authorizing the transportation of, first, new and used store fixtures; second, new and used household goods; third, stock in trade of drug stores was interpreted by the Commission as authorizing the transportation of those articles only when moving [fol. 155] to or from drug stores or to a point where they might be said to be earmarked for final use in a drug store or sale in a drug store.

Now, we are still not advised as to what language constitutes the requirement restriction or the term or condition of the permit which we are said to be violating.

We assume that that will be developed in the hearing. Now, the third point was that we were unable to prepare our defense unless we were advised whether or not the Commission regarded the language of the permit as ambiguous.

Under the decision of the court, unless the Commission so regards the language in the permit, there is no authority to go back of it.

Mr. Lillie advised me seasonably on Monday that it was the contention of the Commission and would be at this hearing, that the language of the permit was ambiguous and that constituted, I concede, seasonable notice which enabled us to present our defense.

The fourth point of the motion was that under the language of the Order we were not advised of what commodities other than those named in the Order we would be called upon to defend today.

Mr. Lillie advised me Monday that there would be no commodities considered in this hearing except those specifically named in the Order. We concede that was seasonable notice which enabled us to prepare our defense of this cause so that the motion is really now moot due to the Commis-[fol. 156] sion having satisfied it, except in the respect that I have named.

I did suggest to Mr. Lillie, and I think he agrees with me that inasmuch as there is assigned for hearing at this same time and place I. & S. Docket M.-5847, I suggest to Mr. Lillie that we agree that Fertilizer as a commodity be included in this case.

I make that suggestion for the reason that the protest on which I. & S. M-5847 is based raises the question of our authority to haul that commodity. If we can transfer that issue into this case, should the Commission decide we do not have authority, I. & S. M-5847 becomes a moot case.

Should they decide we do have authority, it then remains for the interstate shipper and the carrier to present to the Commission evidence justifying its proposed rates in that case.

And for that reason I also suggested that the two cases be not consolidated. Mr. Lillie, I understand, has no authority to appear in the I. & S. case, and I am sure the Commission would not want to pay for a copy of a record in which its lawyer wasn't entitled to appear.

Furthermore, if any party should decide to take Docket MC-C-1610 to court, it would be an utter waste of time for that party to have to bring up all the record on the rates on Fertilizer which have no possible bearing on Docket MC-C-1610.

So if I have correctly disposed now of the matter of the motion; is that a correct statement, Mr. Lillie, substantially what I have said as to our conference?

[fol. 157] COLLOQUY BETWEEN EXAMINER AND COUNSEL

Mr. Lillie: It is, yes.

Mr. Blanchard: If I have taken care of that, I would like to suggest at this time that although I. & S. Docket M-5847 is set for hearing at this time and place, that that case be not heard upon a record consolidated with Docket MC-C-1610, for the reasons stated.

Mr. Cohn: But as I understand it, Mr. Blanchard, it is your conception of MC-C-1610 that it does embrace the commodity Fertilizer.

Mr. Blanchard: We agree with Mr. Lillie that our right to haul Fertilizer should be incorporated in that record along with the commodities named. Mr. Lillie has told me there will be no evidence offered as to our movement of any other commodities except those specifically named in the Order.

Mr. Cohn: And also as the intended use theory that has been discussed will also be considered in the MC-C-1610 case.

Mr. Blanchard: Yes; that is the only question we consider that is involved in that case.

Exam. Sweeney: Is there anyone who has made an appearance in 5847 who would like to make one in 1610?

Mr. Scanlan: Joseph M. Scanlan, 111 West Washington Street, Chicago 2, Illinois. I am an attorney at law and admitted to practice before the Interstate Commerce Commission, appearing for and on behalf of Lee Bros, Inc.

Exam. Sweeney: What is your position?

[fol. 158] Mr. Scanlan: I am an intervenor in support of the position of the Interstate Commerce Commission.

Exam. Sweeney: Off the record.

(Discussion off the record.)

Exam. Sweeney: On the record.

Mr. Lillie: If the Examiner please, as I have stated, I agree substantially with what has been said and the position of the Commission in this matter, as I understand is, is that there is no question as to the territorial violations by the Respondent but there is a question as to whether or not it may transport the commodities named in the Order, which are the only ones which I have any evidence with respect to commodities, and it is our position that the only commodities that the Respondent may transport under its authority to transport principally stock in trade of drug stores; I think there may be one or more items which come under new and used store fixtures but principally it is stock in trade of drug stores, so that the commodities named in the Order we claim are not authorized by the term stock in trade of drug stores unless they are when accepted by the carrier for shipment, earmarked or intended for use as stock in trade of a drugstore, and that those commodities are not authorized when they are transported for other individuals who distribute them through other sources than drug stores; in other words it is the Commission's position that the intended use theory applies to thise case, in the construction of this authority.

[fol. 159] I would like to first offer in evidence by reference the Docket No. MC-1194, which is the docket number of Andrew G. Nelson, contract carrier, and the permit which he was issued in pursuance of a so-called grandfather application. Is there any objection to that?

Mr. Blanchard: Not at all. I would like to say that I also will offer on our behalf, other extracts from the same docket, and I assume that either party may make reference to that docket.

Exam. Sweeney: Mr. Lillie is incorporating the entire record by reference.

Mr. Blanchard: I move that the Docket MC-1194 be incorporated in this record as though it was physically offered in evidence herein.

Exam. Sweeney: The docket will be so incorporated.

Mr. Lillie: I wish to offer in evidence exhibit I ask to have identified as Exhibit 1 of the Commission.

(The document referred to was marked Commission's Exhibit 1, and was received in evidence.)

Mr. Lillie: This is a certified copy of a statement attached to the grandfather application of Andrew G. Nelson, an individual, at that time, which I think is conceded is the same company as is the Respondent in this case now.

Exam. Sweeney: You are incorporating the whole record?

Mr. Lillie: I think it is a convenience for one thing and [fol. 160] this is the only portion of the docket that we are going to have any testimony with respect to; it also includes another statement attached to the Application, and an affidavit which speaks for itself.

Exam. Sweeney: There is no objection and it has been received.

Mr. Lillie: Now I would like to call as a witness Velmer Lyon.

Velmer Lyon was sworn and testified as follows:

Direct examination.

By Mr. Lillie:

Q. Will you state your name?

A. Velmer Lyon.

Q. By whom are you employed?

A. By the Interstate Commerce Commission, as a special agent; my office is 852, U. S. Custom House Building, Chicago, Illinois.

Q. And you have been so employed how long?

A. For 10 years.

Q. As such, did you make an investigation of the operations of Andrew G. Nelson Inc.?

A. Yes, sir.

Mr. Lillie: Mark this Exhibit 2.

(The document referred to was marked Commission's Exhibit 1, Witness Lyon, for identification.)

By Mr. Lillie:

Q. I show you a document consisting of five pages and with items numbered consecutively from 1 to 51, and ask you [fol. 161] what that is?

A. This is information taken from Andrew G. Nelson's freight bills, and shows the detail covering 51 shipments of various commodities moving during the period July 31, 1953 to November 16, 1953, from and to various points named in the states authorized and found so authorized in the Nelson Inc. permit.

This exhibit shows the name of the consignor and consignee, origin and destination of the movement, the number of units of the particular commodity transported, the commodity transported, the weight of the shipment, the rate assessed, the charges collected, and the Andrew G. Nelson freight bill number.

Mr. Blanchard: May I inquire, Mr. Lillie, there is no question raised here as to the application of any illegal rate. That is, the showing of the rate here has no significance.

Mr. Lillie: Nothing except identifying the shipment.

Mr. Blanchard: Now, Mr. Examiner, Mr. Lillie gave me a copy of this statement Monday. I told him I would check it and we have done so, and to avoid the Commission having to laboriously go through and show evidence of movement of these 51 movements, I told Mr. Lillie we would stipulate that the Respondent here did make the contracts and transport each and every one of the commodities shown in the exhibit from and to the points shown in the exhibit, and we waive proof of that on behalf of the Commission.

Mr. Lillie: Now, another question as to the identification [fol. 162] of the consignor and consignees and in that respect Mr. Lyon can testify to this, but if it is agreeable, we can agree that none of the consignors or consignees named herein are drug stores.

Mr. Blanchard: We don't know. Some of them may handle drugs. We find drugs, you know, in a Kroger grocery store nowadays. We don't know, but they are not in the category commonly understood as drug stores. We will stipulate to that.

Mr. Lillie: That is, where it says Blatz Brewing Company, that shows that that is a brewing company, and the Atlantic & Pacific Tea Company, that that is a grocery.

Mr. Blanchard: That is one I have in mind. The A. & P.

does happen to handle a whole lot of drug items but they are not drug stores in the major sense.

I wonder if you would develop one point for me, Mr. Lillie, with your permission, Mr. Examiner. Under your theory I am wondering what your contention is as to a shipment, we will say, of medicine which goes to a wholesale warehouse and subsequently without the knowledge of the carrier, shows up for sale in a Kroger grocery store or an A. & P. store, or something of that sort.

What is the effect on the carrier's status if he had previously transported that article to a drug warehouse only to find out later that it was not disposed of or sold by a drug store?

Mr. Lillie: As I understand it, any statement I would make as to a question like that, would not be binding on the Commission.

[fol. 163] Mr. Blanchard: Only to advise me what we are meeting.

Mr. Lillie: But under the intended use theory which has been enunciated in numerous cases by the Commission, I think the language as used in informal opinions that have been issued by the Commission under the signature of W. Y. Blanning, the Director of the Motor Carriers, are that the shipments must be earmarked or intended for use as a part of a stock in trade of drug stores.

Now, there may be instances where, for instance, the shipment insofar as the Respondent is concerned stopped at some place short of the final destination of a drug store where it could be held that there was enough evidence there to show that they were earmarked or intended for use in a drug store ultimately.

Mr. Blanchard: The diversion for use in a drug store is after the transportation comes, and your position is not a matter which affects the Respondent.

Mr. Lillie: If it has any value as far as my understanding is concerned that would probably be true, that if that kind of shipment originated that it was earmarked or intended for use in a drug store, the carrier would not be responsible for what happened after it lost possession of the goods.

Mr. Blanchard: By drug stores I think, Mr. Lyon, your whole staff will admit that your shipment moving to a drug store isn't as such; the movement is all to a drug store warehouse and it is afterwards peddled out by the owner himself to the actual store.

[fol. 164] Mr. Lillie: I think probably there will be witnesses here who know more about that situation than I do.

Mr. Blanchard: Thank you very much.

Mr. Scanlan: I would like to ask a question. There was a stipulation entered into between Mr. Lillie and Mr. Blanchard a moment ago, and I am not sure whether that stipulation incorporated a provision that that commodity shown in this Exhibit moved for compensation. Was that included in the stipulation?

Mr. Blanchard: And paid a rate.

Mr. Lillie: That stipulated, as I understand it, Joe, that the items as shown on the exhibit would show the payment of the charges.

Mr. Scanlan: I didn't know they stipulated the charges were actually paid.

Mr. Blanchard: If there is any question, it is included in the stipulation with Mr. Lillie's consent.

Exam. Sweeney: Do you stipulate anything shown in facts and figures on Exhibit 2?

Mr. Blanchard: Yes.

Mr. Lillie: It is understood that all these shipments moved for compensation; that they collected the freight charges. There is no question about that.

By Mr. Lillie:

Q. Now, Mr. Lyon, we have agreed that none of the consignors or consignees named in Commission's Exhibit 2 were drug stores. Will you generally refer to some of the con- [fol. 165] signors and consignees there and indicate for the record what business they are engaged in?

A. Blatz Brewing Company: a shipment going from Blatz in Milwaukee to Beacon Distributors Inc., a beer distributor in Chicago.

Linco Products Co., Chicago, Illinois, shipments of Bright Sail; I believe that is a laundry bleach, going to A. & P. Tea Company, Evansville, Indiana.

The next shipment is from Glaser, Crandell Co., Chicago, Illinois to Eagle Grocery Company, 1768 cases of pickles, preserves, jam, jelly, table sauce in glass.

Q. What is the business of those consignors and consignees?

A. Here is a list.

Q. What business are those consignors and consignees in?

A. Glaser, Crandell Company is a wholesale distributor of groceries, I understand.

Q. The A. & P. is a chain grocery?

A. That is right.

Q. And the Eagle Grocery; that is a grocery store, I presume?

A. That is right.

Q. Item 4 on this exhibit: what is Certified Products of Chicago? Have you found out what that is?

A. Yes; they are wholesalers of canned goods. Loyal Packing Co. is a meat packing company in Chicago. That was 905 cases of canned meat; moving from Chicago to Krenning Siglapp Grocery Company, St. Louis, Missouri. [fol. 166] The next shipment is from M. K. Gortz Brewing Co., St. Joseph, Missouri going to Gateway Liquor Company.

Mr. Blanchard: Is it the Goetz Company?

Mr. Lillie: What is the correct name of that brewing company in St. Joe?

Mr. Crouch: Goetz.

Mr. Blanchard: May we stipulate the word maybe corrected; the same misspelling is in the Order.

Mr. Lillie: Item 7, which is a shipment from Dairypak Inc., of Cleveland, Ohio, to Johnson Milk Co., of Detroit, Michigan, of 728 packages of fibreboard boxes, flat or folded flat; my understanding from Mr. Blanchard is that the Respondent does not at this time claim to have authority to transport that item.

Mr. Blanchard: I think what I stated in detail covers it, which I will now repeat for the record: On the authority of the many decisions differentiating materials from supplies, if the Commission finds that the language of the permit is not ambiguous, we would not contend that we had the right to transport the bottles in which the medicine is packed or the wrapping paper in which the stock in trade is delivered to the customer, or the carton in which the prescription is placed. However, we will offer evidence for use in the event that the Commission finds that the language of the permit is ambiguous, to show that at the time the permit was granted we were transporting paper and paper articles [fol. 167] of that type; that our predecessor was, so that it all depends on whether or not the Commission finds the language of the permit is or is not ambiguous.

If it is not ambiguous, and the Commission so holds, we will concede that the packages and wrapping in which stock in trade of drug stores delivered to the customer are not included in the authority.

However, if the Commission is going to go back and find out what they meant by going into ancient history, we will offer evidence showing we were transporting at the time the permit was granted articles of that type. Is that clear?

Mr. Lillie: Yes.

By Mr. Lillie:

Q. Item 8, what is the C.V.A. Corp. of Chicago, Illinois, consignor?

A. A distributor of liquors.

Q. That transportation was from a distributor of liquors to Hamilton Supply Company, of Madison, Wisconsin. Is that another liquor distributor?

A. Yes.

Q. Item 9, Manhattan Pickle Co., of Chicago, Illinois. What is their business? Are they a manufacturer or handler, or what?

A. They are a manufacturer or distributor of canned goods, pickles, shrimp, oysters, etc.

Q. And this shipment moved to where?

A. From Chicago, Illinois, to Pesta Foods and Pick N [fol. 168] Pay and Bartly Company; those three consignees located in Cleveland and Toledo, Ohio.

Q. Do you know what the business of those consignees is?

A. No, other than what is shown here. Pick N Pay is a grocery store.

Q. Items 10 and 11 appear to be shipments from the Manhattan Pickle Company to a grocery company and Foodtown Purchasing Corp. consignors and consignees. Do you know what business they are in, or are they in the business indicated by their names?

A. As far as I know, they are as shown on this exhibit.

Q. Particularly the Manhattan Pickle Company of Chicago; you know that is a distributor of foods, isn't it?

A. That is correct.

Q. Now, this item 12, from Economics Lab. of Chicago, Illinois, being transported to a warehousing company in Cleveland. Have you made inquiries as to what the Economics Lab. of Chicago's business is?

A. Yes; they are manufacturers of soaps, cleansers and detergents.

Q. Item 13?

A. That is covered in Item 4 on page 1.

Q. Now, Item 14 is the M. & R. Dietetic Lab. of Sturgis, Michigan, and involves a shipment from Sturgis to Chicago, with the consignor and consignee being identical. Have you made any inquiries as to what business that consignor is in? [fol. 169] A. Yes; they are manufacturers of dietetic foods, milk powders, and so forth.

Mr. Blanchard: What is the last word in the center column headed: Description of Article, under Item 12: Soilmaster, Electrasol, and what is the next word?

The Witness: Fun; that is a trade name.

By Mr. Lillie:

Q. That is a trade name for what?

A. I don't know; probably a soap powder.

Mr. Cohn: Is it a detergent?

Mr. Lillie: I think probably it is a detergent, but we don't know. Anyway, we have Fun.

By Mr. Lillie:

Q. Armour & Co., of course, is a packing house?

A. That is well known.

Q. And the consignors of shipments, or the consignees, rather, are whom?

A. A. & P. Tea Company, Kroger Company, under Item 16, destination Cincinnati and Woodlawn, Ohio; that was canned meats with vegetables.

Item 17 is from Armour & Co. and consists of 220 bags of dry glue, going to the Gummed Products Co., of Troy, Ohio.

Q. Then the Puritan Company of Chicago, Illinois. Have we covered that?

A. They are manufacturers of food specialties; 921 cases of citrus juice, preserved fruit, prune juice, fig juice in glass, which is going to the C. L. Kangesser and Food Town [fol. 170] Purchasing Corp. located at Youngstown and Cleveland, Ohio, respectively,—a split shipment.

Q. Item 19, Morton Mfg. Co. of Libertyville, Illinois; what business is that company engaged in?

A. That is a manufacturer of cabinets, and that was a shipment going from Libertyville, Illinois to Morley Murphy Co., of Green Bay, Wisconsin.

Q. Do you know what business the Morley Murphy Co. is in?

A. No, I don't.

Q. But these were cabinets or lockers, storage wardrober, or kitchen NOI?

A. Yes.

Q. What does that last number of letters mean?

A. Not otherwise indexed.

Q. Item 20 appears to be a shipment from the Runkle Company of Kenton, Ohio, to the Wolch Nut & Candy Co., of Chicago, Illinois and consists of cartons of candy. Do you know what business the Runkle Company is in?

A. I believe they are manufacturers of chocolate.

Q. Chocolate candies?

A. Yes. Wolch Nut & Candy Co. is a wholesale candy distributor.

Q. In Chicago here?

A. Yes.

Q. Item 21?

A. That was 250 bags of non-fattening dry milk (solid), moving from Algona Co-Op Creamery Co., of Algona, Iowa, [fol. 171] to Dairy Belle Foods Inc. of Chicago, Illinois. They are distributors, I understand, of dry milk products.

Q. Item 22; I think the Gold Seal Company of Chicago, Illinois is the next, and involves the shipment of snowy bleach to the Colonial Warehouses, Inc., of North Minneapolis, Minnesota. What business is the Gold Seal Company in?

A. I believe that is a wholesaler of bleaches.

Q. No. 23: the Chicago Food Mfgrs., Pool Car Group; is that not an association of about 10 manufacturers of different types of food, such as packers, etc.?

A. Yes; you understand it is an association that handles canned goods. That shipment was going to Benner Tea Co., Burlington, Iowa.

Q. And consisted of jelly, salad mustard in glass?

A. That is correct.

Q. Now, Item 24 is Gold Seal Co.

A. That has been covered: Item 25 is Chicago Food Mfgrs., Pool Car Group; that has been covered. 26 is C.V.A. Corporation and has been covered.

Q. Now, Item 27, Wyeth Laboratory of Mason, Michigan; that involves a shipment from Mason, Michigan to Cleveland, Ohio, with the same consignor and consignee, and involves the transportation of milk food, malted milk powder and food, prepared, is that correct?

A. Yes; Wyethe Laboratory are a manufacturer of drugs and dietetic articles.

[fol. 172] Q. It manufactures both drugs and dietetic articles?

A. That is correct, and it is located in Chicago.

Mr. Blanchard: Prepared food; what is that?

Mr. Lillie: It is a special health food.

By Mr. Lillie:

Q. The next one, Item 28; that is Certified Products Co.; have you covered that?

A. That has been covered.

Q. Item 29, Armour & Co.?

A. That has been covered.

Q. Item 30, Olds Products Co., of Chicago: what business are they in?

A. Distributors of mustard.

Q. Item 34 appears to be a different consignee. What is the consignor or consignee?

A. I understand they are distributors of canned goods; Topco Associates Inc., of Green Bay, Wisconsin.

Q. Piggly Wiggly, the consignee; is that a grocery store?

A. That is a chain grocery store.

Q. Item 36 is a shipment from Montgomery Ward & Co., of Chicago Heights, Illinois to Montgomery Ward & Co., of Detroit and Earborn, Michigan; just for the record, what business is Montgomery Ward & Co. engaged in?

A. That is engaged in the merchandising business.

Q. It is a mail order house?

[fol. 173] A. Yes.

Mr. Diehl: And a retail house, also; retail outlets?

The Witness: That is correct.

By Mr. Lillie:

Q. And that commodity transported was what?

A. 189 cartons of batteries, electric storage, wet, with chemicals.

Q. Moving from where to where?

A. From Chicago Heights, Illinois, to Detroit and Dearborn, Michigan.

Q. What are the type of batteries described there; are they the ones used in an automobile?

A. That is correct. Item 37 has been covered, as also 38.

Q. 39 is Illinois Meat Company?

A. That is a meat-packing company located in Chicago and the shipment consisted of 784 cases of canned meats going to Grand Rapids Wholesale Grocery, Grand Rapids, Michigan.

Q. The next item—I think all the rest of the items on page 4 have been covered.

A. That is correct.

Q. Also the first two items of page 5 of the exhibit. Item 48, however, is a shipment from the Mogen David Wine Corp. to Wasserstrom Wine & Import Co.?

A. Yes, at Columbus, Ohio. Mogen David is a wholesaler of wines, also a manufacturer of wines.

Q. In Chicago?

[fol. 174] A. In Chicago.

Q. Now, Item 49: The Wolch Nut & Candy Co., of Chicago, Illinois. What is their business?

A. Distributors of candy and they may be manufacturers, too. I am not certain about that.

Mr. Lillie: I think he has covered all the items here. Did we cover the Puritan Company?

The Witness: Yes; in Item 18.

Mr. Lillie: Mark this Exhibit 3.

(The document referred to was marked Commission's Exhibit 3, Witness Lyon, for identification.)

By Mr. Lillie:

Q. I show you a document marked Commission's Exhibit 3 for identification, and ask you what that is?

A. This is a list of shipper accounts with whom Andrew G. Nelson has contracts and was furnished to me by Mr. Harold E. Nelson, December 14, 1953.

Q. Mr. Nelson is one of the officers?

A. Harold E. Nelson is president of Andrew G. Nelson Inc. At the time he furnished this to me, it contained information about the shippers, and the names of the shippers, and the date of the contracts. I inserted the number of shipments transported by the shipper and the commodities distributed by the shipper.

Q. So the first and third column, then, were furnished you by the Andrew G. Nelson Inc.?

A. Yes.

[fol. 175] Q. And you inserted the second and fourth columns to show the number of shipments for those particular companies, and also the general description of commodities handled, manufactured, or distributed by such companies?

A. That is correct.

Mr. Blanchard: May I have your permission to inquire at this point?

Mr. Lillie: Yes.

Mr. Blanchard: You show 96 shipments for Armour & Co. and you list them as packing house products. You don't mean that all 96 shipments were packing house products in the strict sense, do you?

The Witness: It could be soap, soap powder, canned meat, as shown on our table.

Mr. Blanchard: They could have been fertilizer?

The Witness: I don't recall any fertilizer shipments, although there could have been one or two.

Mr. Blanchard: In other words, this right-hand column is merely a statement of one or more of the principal products that the company handled and you don't mean to limit the production of any of these companies to the specific article named in the right-hand column?

The Witness: That is correct.

Mr. Blanchard: In other words, Abott Laboratories may handle hair brushes and combs; you don't mean to limit to [fol. 176] nothing but drugs?

Mr. Lillie: I think I stated in my statement that it was just a general over-all designation.

Mr. Blanchard: That clears it up then?

Mr. Lillie: Maybe I should introduce these into evidence. I wish to introduce Commission's Exhibits 1, 2 and 3.

Exam. Sweeney: We have Exhibit 1 in evidence already.

Mr. Lillie: Then Exhibits 2 and 3.

Mr. Blanchard: No objection.

Exam. Sweeney: Exhibits 2 and 3 are received in evidence without objection.

(The documents marked Commission's Exhibits 2 and 3, Witness Lyon, were received in evidence.)

Cross examination.

By Mr. Blanchard:

Q. You show such consignees on Exhibit 2 as A. & P., Kroger Stores, Montgomery Ward. Have you ever been in an A. & P. chain grocery store?

A. Yes, sir.

Q. Did you find offered for sale in that store, practically every one you have ever been in, cosmetics, face powders, face cream?

A. Yes.

Q. Razor blades?

A. I don't recall razor blades.

Q. Tubes of shaving cream?

A. Yes, and of toothpaste.

[fol. 177] Q. Of women's face powder?

A. Yes.

Q. Proprietary medicines; I mean packaged and with the labels printed right on the bottle; Ex Lax, for example?

A. I buy at the Jewel store.

Q. But such articles I have mentioned are commonly carried by Kroger, A. & P., Jewel, and the rest of them?

A. Yes.

Q. Have you ever been to a Montgomery Ward retail store?

A. Yes, sir.

Q. Is it not a fact that those stores commonly carry very sizeable departments which are known as drug departments?

A. Yes.

Q. And they are purveyors of drugs and medicine, particularly of the proprietary kind which does not require concoction on the spot, to a very large degree?

A. Yes.

Q. I don't know whether this question should be addressed to you or your counsel, with reference to the shipment of locker storage wardrobes; is it the contention of the Commission that ordinary clothing storage, steel lockers are not included in the term?

Mr. Lillie: I think you are referring to store fixtures.

Mr. Blanchard: Yes, office and store fixtures.

Mr. Lillie: As I understand a fixture, Mr. Blanchard, it is something permanently attached to a building.

[fol. 178] Mr. Blanchard: In other words, a show case on the floor under the Commission's term would not be a fixture?

Mr. Lillie: My opinion of the definition of that is that it is not a fixture; under the general law in real estate, a fixture is something of a permanent quality.

Mr. Stephens: I am going to object to this type of cross examination of Mr. Lillie. He is not on the witness stand and the items Mr. Blanchard is addressing himself to may be properly advanced as argument, with no useful purpose being served in going into the term.

Exam. Sweeney: Is this covered in detail in Exhibit 2?

Mr. Lillie: There is one item, yes. It is the item on the top of page 3. That is the only item of that type which is included in the exhibit and it consists of 119 cabinets of lockers, storage wardrobes or kitchen NOI. That last item is quite indefinite.

Mr. Blanchard: I am utterly at a loss to find out what the position of the Commission is unless I inquire from the attorney of the Commission.

Exam. Sweeney: Objection overruled; you may continue.

Mr. Blanchard: I think the question has been answered, that the Commission interprets a store fixtures to be something nailed to the floor, to the wall, or to the ceiling.

Mr. Lillie: That is what the Commission's counsel understands it to be; I can't bind the Commission.

[fol. 179] Exam. Sweeney: How about new and used household goods? Does that cover the cabinets?

Mr. Lillie: That is a very disputable question, as to what is included in the household goods authority. There are cases that hold many things of that nature are not household goods.

Mr. Blanchard: And right while we are in this connection, Mr. Examiner, we have as an exhibit and will offer later, a statement from Household Goods Carriers' Bureau Tariff 38, MF-I.C.C.-46, wherein the term household goods is defined and the definition is shown to have been taken from a definition previously prescribed by the Interstate Commerce Commission in 17 I.C.C. 467.

Exam. Sweeney: Mr. Blanchard, I don't think you have to go into detail about that sort of thing now. You are going to do it later.

Mr. Blanchard: I mentioned it as a basis of another question of counsel, if the contention in this case, since the household goods are involved, whether they intend to define it again after having defined it. Is the purpose of the Commission to define household goods?

Exam. Sweeney: I don't know what the purpose of the Commission is.

Mr. Stephens: The Commission is not on trial here. There is the witness. If there is anything Mr. Blanchard wants to develop, he can ask the witness.

[fol. 180] Mr. Blanchard: It is customary to inquire of witnesses as to facts. If I had a witness on the stand and somebody asked him what his position was in the case, I would resent it very highly, because the determination of position is for counsel.

Exam. Sweeney: You will both have an opportunity to file briefs.

Mr. Blanchard: In courtesy to counsel, I think I should ask him. I will ask the witness, if you wish.

Exam Sweeney: Yes; I wish you would and counsel can object if he doesn't like the question.

By Mr. Blanchard:

Q. Mr. Lyon, is it the purpose of the Commission in this case to define what the term household goods means?

Mr. Lillie: I object to that because the witness is not qualified to answer it, and what the purpose of the Commission is cannot be pre-determined at this time in this hearing.

Exam. Sweeney: Objection sustained.

Mr. Blanchard: May I note an exception?

Exam. Sweeney: That is not necessary.

Mr. Blanchard: I would like also to note an appeal to the Commission from the Examiner's ruling. I am merely seeking to find out what we are accused of here.

Exam. Sweeney: This witness is not in a position to tell you what the Commission intends to do in the case.

Mr. Blanchard: That is why I asked counsel. I under-[fol. 181] stand you directed me to ask the witness.

Exam. Sweeney: He is presented for cross examination. Ask any questions you have of him. If you want to have a discussion off the record with Mr. Lillie, go off the record.

Mr. Cohn: I don't believe there is any mystery about what this hearing is about. It is specifically set forth in the Order and I think counsel understands that.

Mr. Blanchard: I have no factual question of the witness but I may from time to time ask what I am expected to defend here and, of course, I will have to address those questions to counsel because I think the witness wouldn't know about them.

Exam. Sweeney: If you are in doubt, we will go off the record and you can have a discussion with Mr. Lillie.

Mr. Blanchard: I think counsel answered he interpreted locker storage wardrobes not being fixtures because they were not nailed to the floor. That is perfectly satisfactory. Now, I would like to ask counsel here is it the contention or intention, rather, of the Commission to further define household goods in view of the fact that they have already defined that term and it is in a tariff publication?

Mr. Stephens: To which we object. It is addressed to counsel. It is argumentative. Counsel for the Commission will put on his case from the witness stand and Mr. Blanchard has been notified of the intention of the Commission.

Mr. Scanlan: Mr. Blanchard knows the Commission [fol. 182] isn't intending to——

Mr. Blanchard: If counsel can answer for the Commission I will accept it, but I am not putting Mr. Lillie on the stand. I am merely trying to find out if I can rely on a published statement of the Commission stating what household goods are or am I faced with a question of possibly the Commission changing its own established definition, in the proceeding?

Exam. Sweeney: I don't see how Mr. Lillie can answer your question. He doesn't know what the Commission would do. Anything he would tell you wouldn't mean anything.

Mr. Scanlan: I move that the entire statement just made by Mr. Blanchard be physically stricken from the record.

Exam. Sweeney: Overruled; continue, Mr. Blanchard.

Mr. Blanchard: That is all I have.

Exam. Sweeney: Any further questions?

Redirect examination.

By Mr. Scanlan:

Q. Mr. Lyon, are the shipments that are shown on Exhibit 2 intended to be merely representative of the shipments that were transported by the Andrew G. Nelson Inc.?

A. Yes; that is correct.

Q. And it is not in any way intended to reflect all of these types of shipments that were handled by Andrew G. Nelson Inc.?

A. No, sir.

Q. Now, will you please refer to Exhibit 3?

A. Yes.

[fol. 183] Q. Is Exhibit 3 showing the list of the shippers of Andrew G. Nelson Inc. intended to reflect all of the shippers with whom Andrew G. Nelson Inc. has a contract, or was that merely of shippers given to you by one of the officials of this Respondent?

A. That was a list given to me by Mr. Harold E. Nelson, and is supposed to reflect all of the shippers with possibly one or two exceptions.

Mr. Lillie: As of that date?

The Witness: As of the date of this document.

By Mr. Scanlan:

Q. Do you recall any investigation, Mr. Lyon, to determine whether or not any contracts in addition to these had been added or subtracted by the Respondent in this case?

A. Had been added?

Q. Added or cancelled, rather, from time to time?

A. No.

Q. In other words, the 46 contracts shown in Exhibit 3 were the effective contracts in effect on the date given to you by the Respondent's agent, isn't that right?

A. I think that is correct.

Q. And that was on December 14, 1953, as shown on the exhibit?

A. Yes.

Q. Mr. Lyon, did you make any investigation to determine whether or not all of the contracts that are shown on

Exhibit 3 have been filed with the Interstate Commerce Commission?

A. No, sir.

[fol. 184] Q. Did you make any investigation to determine whether or not all of the contracts shown on Exhibit 3 were incorporated in the schedule of minimum rates and charges that was issued by this Respondent?

A. No, sir.

Mr. Scanlan: That is all I have.

By Mr. Cohn:

Q. I didn't get your position with the Interstate Commerce Commission.

A. Special agent.

Q. And you have been special agent for how many years,

A. Ten years.

Q. Now, in preparing your Exhibit 3 from what source did you determine the number of shipments as shown in the second column of the exhibit?

A. That was determined from an examination of the Andrew G. Nelson Inc.'s freight bills.

Q. And that covers what period of time?

A. That covers the period September 1, 1953 to December 7, 1953.

Q. And from what source did you determine the information shown in the fourth column: Commodities handled, manufactured or distributed?

A. That was from information furnished from my general knowledge and some questioning of Mr. Harold Nelson.

Mr. Blanchard: Which column is that?

Mr. Cohn: The fourth column.

[fol. 185] By Mr. Cohn:

Q. And who is Mr. Harold Nelson?

A. President of Andrew G. Nelson Inc.

Q. The respondent in this case?

A. Yes.

Mr. Cohn: That is all.

Mr. Blanchard: I take it this is not the witness you intend to go into on direct to ask to interpret the language of the permit.

Mr. Lillie: What is that?

Mr. Blanchard: I take it that any question directed to this witness concerning the Commission's interpretation of the language in the permit due to the fact that you did not go into that fact on direct, would not be in order?

Mr. Lillie: I don't think he is qualified to answer your question.

Mr. Blanchard: That is all.

* * * * * * *

[fol. 188]

* * * * * * *

Andrew G. Nelson was sworn and testified as follows:

Direct examination.

By Mr. Blanchard:

Q. Will you state your name and address?

A. Andrew G. Nelson; I live at 5302 Cornell, Chicago, Illinois. I am in business at 1119 E. 42d St., Chicago, Illinois.

Q. In what business are you engaged?

A. At the present time I am engaged in the warehousing business, local trucking, and retail coal merchant.

Q. Are you presently engaged in the transportation of property interstate for hire?

A. Interstate?

Q. Yes, interstate?

A. No, I am not.

Q. I note, Mr. Nelson, that the name of the Respondent in this case, Andrew G. Nelson, is the same as yours. Will you state for the record how that comes about?

[fol. 189] A. Well, when I incorporated my interstate operations, I had been in business and a part of the neighborhood for a great many years, and I wasn't ashamed of my name, and I figured it would help me, and I always did business under my own name, and I incorporated as Andrew G. Nelson Inc.

Q. Prior to that time, in what capacity did you operate?

A. I operated as an individual warehouse and express company, Andrew G. Nelson, doing business as.

Q. You are the Andrew G. Nelson shown by Docket MC-1194, who received a permit for interstate trucking for hire within the states and of the commodities described in that permit?

A. I am.

Q. At that time I believe the permit showed you were an individual doing business as Nelson Warehouse & Express Co. When did you receive that style and begin your operations as a corporation?

A. Roughly, March, 1951.

Q. Have you, at the present time, any stock ownership or interest in this corporation which is Respondent here, that bears your name?

A. I have no interest at all, no financial interest whatever.

Q. How did you dispose of your former interest?

A. By sale.

Q. Of what?

A. Of stock.

[fol. 190] Q. To the present owners?

A. To the present owners. I assume that they are the present owners; I don't know.

Q. The present owners are Mr. Nelson and Mr. Peters?

A. If they sold it, I wouldn't know it.

Q. The record shows that the president of this corporation now is a man by the name of Harold E. Nelson; is he any kin or relation to you?

A. Absolutely none.

Q. Were you engaged in the interstate carriage of property for compensation at the time of the passage of the National Recovery Act, called the Blue Eagle, NRA?

A. I was, yes.

Q. Did you at that time make any registration or receive any certificate or document, evidencing that you had filed and registered in compliance with that Act?

A. Yes, I did. I had also registered under the Coal Retailing Act and when the inspectors and trade associations notified me they had an office in the vicinity of 44th and Halsted Streets, I went over there and registered.

Q. I hand you a document which appears to be an original Certificate of Registration under the Code of the Trucking Industry.

Exam. Sweeney: It will be marked.

Mr. Blanchard: I have photostatic copies.

By Mr. Blanchard:

Q. I ask you if that is the document which you received? [fol. 191] A. Yes; that is the one I received.

Q. I hand you a series of photostatic copies and ask you if they are true copies of this original which you just identified?

A. Yes, they are.

Mr. Blanchard: I will now ask to have one of these photostatic copies marked for identification as Respondent's Exhibit 4.

(The document referred to was marked Respondent's Exhibit 4, Witness Nelson (Andrew G.), for identification.)

By Mr. Blanchard:

Q. Do you recall about when the National Recovery Act ceased to become effective?

A. You mean the date?

Q. Not the exact date. About the year; just the year will be enough.

A. It was the year that you had that chicken case. I think it was in the summer of 1934, or thereabouts.

Q. Are you referring to the so-called Schechter case?

A. The case in New York when this thing became null and void, along with other things.

Q. It was a decision of the United States Supreme Court, was it not?

A. Yes; it had to do with a chicken case in New York, when some one came in and bought the thing, and the Supreme Court came in and kicked it all out.

Q. You were engaging in transportation for hire at that time?

[fol. 192] A. I was, yes.

Q. Do you recall when the Federal Motor Carrier Act, now comprising Section 2 of the Interstate Commerce Act, became effective?

A. It was along shortly after that somewhere.

Q. You mean shortly after the chicken case?

A. Yes; it seemed to me that the whole thing hung together.

Q. At that time you were still engaged, when the Act became effective, in your trucking operations?

A. Absolutely.

Q. What, if anything, did you do when you received the information that the trucking industry had become subject to Federal regulation?

A. I wasn't very happy about it; I will say that.

Q. I didn't ask you how you felt. I asked what you did.

A. When we read it in the papers, the first thing we did was try to find out something about it. We belonged to the Truck Owners Association, and went over there and got what information we could, and eventually things came out, and I was told to go downtown; they had some bureau down there, and I went down there.

Q. Who had some Bureau?

A. The Interstate Commerce Commission,—the Bureau of Motor Carriers. I think it was in the old Post Office Building; I am sure it was there.

[fol. 193] Q. And you went to the office and contacted the proper parties?

A. Yes; several times.

Q. What did you learn at that time? What was necessary for you to do?

A. Well, lots of things. Every time I would go there I would learn something new, but I eventually had to make an application and submit evidence that I had been doing these things, and that sort of thing.

Q. Were you informed at anytime as to whether there was more than one type or kind of carriers?

A. Generally I was informed. There may have been two; there might have been more, I don't know,—common carrier and contract carriers.

Q. And did you express to the Bureau at any time any desire or lack of desire to assume either of those capacities?

A. I don't quite follow you.

Q. Did you tell them you wanted one and not the other, or vice versa?

A. Well, you talk back and forth on what you wanted, and I was given to understand that a common carrier had obligations and a contract carrier had obligations; that a common carrier, they said, had to have fixed routes and could not operate exactly the way he was operating, which meant irregular routes over a vast territory, and I didn't want any part of common carrier, because I had some unfortunate experience by hauling so much per hundred [fol. 194] pounds, in a certain place and woke up with some carloads of straw hats and kotex, and I didn't want any more like that.

Q. Did you contact this Bureau with reference to your rights and duties more than once?

A. Yes; several times, both personally and by phone.

Q. And you did advise that you didn't want anything to do with by any hook or crook, becoming a common carrier?

A. Definitely that; I didn't want any part of that.

Q. Did the Commission's Bureau of Motor Carriers ever send anyone to your place to make an inspection of your operations and what you were doing?

A. Yes, they were there several times.

Q. What did that inspection consist of?

A. The usual thing. A man comes into the office, identifies himself, says what he wants, talks to you and looks at your records; just the usual thing, whatever he does when he makes an inspection.

Q. What specifically are the records he asked to see and what are the records you showed him?

A. The delivery tickets and what you had been charging. He was not so much interested in that. He was interested in our delivery tickets and bills of lading,—whatever you had of that sort.

Q. Did they also inspect your premises and look at your vehicles?

[fol. 195] A. Yes, looked at the warehouse; looked at the truck; looked at the garage. They inspected the place.

Q. How long were they in your office on this first inspection?

A. It seemed like a long time. It was probably four or five hours; it seemed longer.

Q. They looked at your books of account to see who you were serving, who was paying you, your delivery tickets, where you had gone, etc.?

A. They looked at that particular book; they looked at everything; they asked and we just gave it to them. They weren't belligerent. They just asked to see this and we showed it to them.

Q. Have you prepared at my request a list of the customers for whom you were performing transportation for hire at that time and by that time I mean 1935 and the period immediately preceding?

A. Well, I have a list from my memory and from the cash book back to 1919 when I started in business.

Q. Did you refer back to your original transportation tickets which you had submitted for inspection to the Bureau people?

A. I do not have those, the original transportation tickets. I found most of the names in a cash book; well, most of them are from memory, of course.

Q. What happened to the original transportation tickets similar to those you attached to your MC Docket 1194 and which you submitted for inspection to the Bureau of Inspectors?

[fol. 196] A. My patriotism got ahead of me during the war. I was a leader in the local defense effort and when a drive came up I gave all of my paper to the drive as salvage material.

Q. Have you recently, at my request, made another search to see whether or not those shipping tickets at that time might have escaped your patriotic efforts?

A. Yes; we have a big warehouse. We spent a couple or three hours looking around, but certainly couldn't find any.

Q. Now, you prepared a list of the customers for whom you were performing transportation for hire in that period I referred to?

A. I have one in my pocket.

Q. Will you go over the list and tell the name of the company, the commodity you were hauling, and the points between which you were hauling at that time; just a general outline. You don't need to go into detail.

A. The Melba Manufacturing Company, manufacturers of toilet preparations, powders, perfumes, etc. One of my first accounts,—my wife was secretary to Mr. Jones, who was there, and that is how we got the account. We held it up until the time they sold out to Schulte Brothers, somewhere in the year 1932 or 1933, the cigar people, for a couple years. They operated for a couple years and we did the business for them.

Then we had the Walgreen Company, operating a chain of drug stores, warehouses, etc., and we have had them since the early part of 1920, shortly after we started in business.

[fol. 197] Q. Do you still serve them as a warehouse facility?

A. We serve them as a warehouse facility, and in local deliveries, specialized and contract carrier, and local deliveries. We had the Neisner Brothers, who are operating this 5 cent to $1 store system merchandising all over the United States; and their home office is in Rochester, New York, and we had their account for possibly three years, servicing their stores in this area as far as Milwaukee and Hammond. I believe they have a store in Gary.

Mr. Lillie: When was that?

The Witness: That was shortly after the St. Valentine's Massacre, I think,—around 1931 or 1932, in that general period. The reason I say that I got the account, because those *those* boys were playing with it, and when they got shot up, I got it.

Q. You continued to serve them for how long?

A. Well, up until the time somebody bid lower than I did and took it away from me, which was possibly two or three years afterwards. We established all their stores in this area. After we got everything going perfectly, somebody went under my rate and I lost it.

Martin's Marble Company, 53d & Wallace, or 51st and Wallace Street; they are out of business now. We had that account for probably 8 or 10 years.

Q. Including 1935?

A. No; they were out of business before 1935. I don't [fol. 198] know just when. The marble business went out pretty much in the early 30's.

Q. Go ahead.

A. George Anderson Marble Company; they were at 500 West 35th Street; Peerling Marble Company, and the Acme Marble Co.; they were at 49th and Maplewood; and also the Henry Marble Company, around 33rd, and LaSalle.

At that particular time our business was largely in marble, interstate and intrastate also. We had banks in Milwaukee and banks in Plymouth, Indiana. And also South Bend and Gary, and Kenosha, and these marble people we were equipped at that time to haul marble, and we seemed to follow in that rut and that went along for a few years and they gradually went out of business.

Q. You would deliver these shipments of marble to where?

A. To buildings being in construction.

Q. You mentioned banks.

A. Wherever they used marbles in abundance. Davis Slate Manufacturing Company was the first account I had when I came out of the army. We had that business until 1940; they were manufacturers of slate, slate roofs, flagstones, etc. And that went into this whole area here.

Q. To what kind of projects?

A. Mostly manufacturing concerns, like Westinghouse, Kestner & Hecht Electric Co., or all that kind of people, [fol. 199] and some of the slates went into buildings for slate thresholds.

The Loyal Electric Co. were electrical equipment manufacturers. Grossman Manufacturing Company; the Grand Rapids Furniture Company; they were on Wabash Avenue. They were dealers in new furniture and they also bought a great deal of furniture in Grand Rapids, Michigan, where it was manufactured, and we hauled it to Chicago and distributed it anywhere from South Bend to Milwaukee.

Q. To what kind of establishments would you distribute it?

A. Households and things of that type. I don't recall any office furniture but mostly it was new furniture you use in your house.

Q. To whom did you deliver it when you brought it in?

A. Everybody.

Q. Was it stores, warehouses, or what?

A. They had their own warehouse. They delivered it there and in turn we would pick it up there and take it out to wherever it was sold.

Q. That was a two-way movement from Grand Rapids and then later out from Chicago?

A. That is right. The Gordon Furniture Co., used and new furniture; they were furniture dealers in our immediate neighborhood. The M. J. Sanborn Company; they were furniture people.

The Federated Drug Company; they were suppliers to drug stores of all kinds of articles, mostly toothpaste, prepared things. They were sort of a broker and they de-
[fol. 200] livered to all types of drug stores as well as warehouses of things of that type.

The Buyright Drug Company were competitors of theirs. We had their business when they started up. The Goodrich-Westport Steamship Company; we picked up for them and delivered for them wherever they sent us. Some of the movements might have been as far as Gary. Most of them were in the Chicago metropolitan area. They went out of business too.

Q. That was about when they went out of business?

A. I would say in the neighborhood of 1933, or 1932, thereabouts; a lot of people went out of business.

Q. During the depression?

A. Yes, right afterwards. It was pretty rough going. The A. C. Drury Company, dealers in raw chemicals, oils, talcs, perfumes, and that sort of thing. We had that account since 1920 and we still have it *do.*

The Hendrickson Motor Truck Company, manufacturers of motor truck special equipment in Chicago. We haul steel and bodies and transmissions. Some we pick up out of the state.

The Godchaux Sugar Company of New Orleans and their ship their sugar up by carload and we distribute it in the Chicago metropolitan area and interchange, including Gary, or wherever they send us.

The Freeman Paper Company from Menasha, Wisconsin; of paper towels and napkins, containers and Dixie cups [fol. 201] and all that kind of thing.

The Armour Fertilizer Company, of Chicago Heights, Illinois; we distributed fertilizer for them for several years in the spring and fall; it was a seasonable business.

Q. To where?

A. Anywhere they sent us. It was in this entire area which would include, Indiana, southern Wisconsin, and country clubs.

Q. From where?

A. From Chicago Heights.

Q. Go ahead.

A. Goetz Brewing Company, St. Joe, Missouri; we handled the near beer and malt drinks before beer was legalized.

Q. Did you handle anything for them after prohibition went out?

A. No, it wasn't necessary. The Stone Brick Company; they were out on 63d Street and they developed a lot of suburban sewers all over this area, and we handled sewers and cover brick from Blue Island and various points.

The Robinson Waste Company, of 36th & Iron. They were dealers in wiping clothes and that sort of thing, wiping rags in bales, 500 or 600 pound bales.

The Moser Safe Company of Chicago, we moved safes and steel cabinets for them.

Q. To what kind of places?

A. Any place they would send us to.

Q. Was it in any way limited to drug stores?

[fol. 202] A. No; anybody who would buy a safe, we would deliver it.

Q. Go ahead.

Exam. Sweeney: Mr. Blanchard, can we have an understanding that all these movements are in interstate commerce?

Mr. Blanchard: The witness identifies where he says they were for local delivery.

Mr. Scanlan: I don't think we can have that understanding.

Mr. Blanchard: The basic question was that during this period.

Mr. Scanlan: We don't even know what period it was. Most of them he quit hauling for them in 1932.

Mr. Blanchard: I think you should listen to the witness a little more carefully.

Mr. Scanlan: Perhaps.

Mr. Blanchard: The first question was during the period 1935 and the years immediately prior thereto. Is that what you have been answering about, on that basis you have been testifying?

The Witness: Yes; you said prior to 1935 and I went back since I started my business.

Mr. Cohn: That is an entirely different answer than is presupposed by the question. As I understand the witness's answer, it is prior to 1935.

The Witness: That is right.

Mr. Blanchard: And including 1935.

[fol. 203] The Witness: Yes, and some of it we still have now.

Mr. Cohn: In some cases transportation ceased before 1935?

The Witness: In some cases it may have, yes.

By Mr. Blanchard:

Q. And you have a number of cases, you stated, when you were certain at the time you had the business, the company went up to that time in business?

A. Yes.

Q. Your service for the Goodrich Steamship Company; what type of freight did you haul for them?

A. They would solicit business in this area and put it on boats and take it up to Milwaukee, overnight, or maybe to South Haven, but that was their business. They were trying to reduce the rail rate by truck and boat.

Q. In other words, it was a part of a movement by your trucking it to boats bound for Benton Harbor and Milwaukee, which the steamship company served?

A. Yes, and part of the movement on rail, because it was distributed.

Q. It was freight they were hauling?

A. Yes.

Q. And you were, I take it, operating as the agent of the steamship company, in completing or beginning the movement?

A. They were paying for it.

Q. Go ahead and give us some more.

A. The Long Plumbing and Heating Company of Chicago; plumbing fixture people, heating materials and plumbing.

[fol. 204] The Goethard Chili Company of San Antonio, Texas; they handled chili products of all kinds, beans and things like that.

Q. How did they handle it?

A. We had a warehouse that we put what came in by carloads, and we distributed wherever they told us to.

Q. And neighboring points, points outside of Chicago?

A. Yes; some would go to Gary, Hammond and might go as far as Milwaukee, but wherever they told us to take it, we took it.

Q. Go ahead.

A. A. E. Childs & Co., New York, manufacturers of witch hazel, and we handled their account, and that went to various places. Phillips Brothers, manufacturers, of New York; zinc oxide. The Busse Safe Company of Chicago: manufacturers of safes; we delivered for them.

Q. Where?

A. I couldn't say; everywhere.

Q. Local deliveries or deliveries outside the state?

A. If they asked us to go outside the state we would go. If they didn't, we wouldn't. Wherever they sold a safe.

Q. Wherever they would want the delivery?

A. Yes. Renault, Inc., manufacturers of wines and fruits and juices, done up; they were done in alcohol. This is before prohibition was repealed.

And we had another Pennsylvania Sugar Company, the same type of business as Godchaux; also the Franklin [fol. 205] Sugar Company: We had the Myles Salt Co.; I think they are from New Orleans and we had the Peerless Paper Co.

Q. Where were they?

A. From Wisconsin.

Q. And from and to where did you haul *from* them?

A. Every place they asked us.

Q. Was it just from Wisconsin to nearby points in Wisconsin, or did you have relatively long hauls with it?

A. It would be nearby points in Chicago, not Wisconsin. They were in Menasha and they shipped it down here and we would haul it.

Q. What type of establishments would you take that to?

A. Anybody that buys paper.

Q. Was it limited to drug stores or any other particular class of trade?

A. No.

Q. All right; proceed.

A. We had Judge & Dolph of Chicago, wines and liquor people. L. Pine & Co.; they were a large department store and they went out of business. That is about all I have.

Q. Speaking of these types of transportation, did you transport the commodities you have named each of them, between points in the different states in the area subsequently covered in your permit?

A. I wouldn't say to each. I transported wherever they [fol. 206] wanted me to and under any condition, but I would say a great many movements were out of the state.

Q. And that applies to each one of the persons you have described?

A. To the best of my recollection, it does.

Q. The time element of these transportations; have you specified each case in which the service being rendered terminated before 1935?

A. Well, some of them we still have.

Q. I mean where the account was lost——

A. Most of these were prior to 1935, yes.

Q. —where the account was lost prior way back to 1930 or 1932 you mentioned it?

A. Yes, I did.

Q. Referring back to Exhibit 4, I note the certificate identifies you as operating five vehicles. Was that typical of the number of vehicles you were operating at this time and at the time which followed up to and including July, 1935?

A. We had our ups and downs. Like everybody else we didn't do so well during the depression. We operated and would wear out a truck and buy a new one. Sometimes we would have five and sometimes as many as 12 or 15. I mean we were continually buying.

Q. Would this be the low or high, as far as the number of trucks is concerned?

[fol. 207] A. I would say we were not way up. It was pretty low. You are speaking of the NRA thing?

Q. Yes.

A. Anywhere for hire?

Q. Yes. I don't think the record shows I submitted the original of this Blue Eagle or NRA to counsel for inspection. I have given each of them a photostatic copy but I think under the rules I should submit the original with the copy for inspection. Now during the time that you were contacting the Motor Carrier Bureau, did you contact just anybody that was there, or did you have more contacts with some one or more employes than you did with the others?

A. After a couple of trips I think I was more or less handled by Mr. Petritz.

Q. Was he one of the persons who made the inspection of your premises and inspected your shipping tickets?

A. Yes; I would say he was assigned our account.

Q. Did Mr. Petritz ever advise you as to his opinion of your rights, or what kind of a permit or certificate you could get?

A. Well, he steered me; he helped me very much. I didn't know anything about it and I just asked him.

Q. Did he ever make any statements to you concerning whether or not in his opinion you could qualify as a common carrier?

Mr. Scanlan: I object. Mr. Petritz is dead. I object to quoting any statements of a dead man.

[fol. 208] Mr. Blanchard: This man appeared in an official capacity for the Interstate Commerce Commission, assigned to this particular witness's service.

Mr. Scanlan: That doesn't have the slightest thing to do with my objection. My objection goes to the fact that Mr. Petritz is dead and it is highly objectionable to attempt to repeat any conversations with a dead man.

Exam. Sweeney: Did you talk to anybody about this, on this problem?

The Witness: If I did, I wouldn't know their names.

Exam. Sweeney: Did you talk to anybody else, even though you don't know their names?

The Witness: If somebody was there with him, whoever I was assigned to, I would talk to. I wouldn't know.

Exam. Sweeney: Don't you remember whether you talked to only one man or to more than one?

The Witness: When I first went up there I didn't know the man I talked to. I finally wound up with Mr. Petritz and he might have talked to me before, and that is the only man I know. I knew his name because that is the only man I knew.

Exam. Sweeney: Apparently you are pretty confused now as to who talked to you about anything. Could you tell us now as to what this Mr. Petritz told you?

The Witness: I don't follow you. You say I am confused. I am not confused. I went into the office.

[fol. 209] Exam. Sweeney: You say you talked to people and you don't know their names.

The Witness: When you got in a place like that, they say: Wait a minute; sit down. They finally tell you to go see this man, and you do. Eventually you wind up with somebody else. You don't go in and say who you want. In those days you went down to the Commission and did what they told you to do.

Exam. Sweeney: Is this Mr. Petritz the only one that discussed your business with you?

The Witness: I would say thoroughly he was the only one that talked to me, yes.

Exam. Sweeney: Objection overruled.

By Mr. Blanchard:

Q. If you refer to the docket you will find Mr. Petritz's name in the docket, Docket MC-1194, as the man assigned to this case. What direction did you receive from any employe of the Commission, or what suggestion, as to the right to apply for a certificate as a common carrier?

A. I mentioned it along with other things.

Mr. Stephens: What difference does it make? You have already said you didn't want to have anything to do with being a common carrier. Are you trying to impeach your own witness on that? I object.

Mr. Blanchard: I will withdraw the question. It isn't important.

By Mr. Blanchard:

Q. When did you first receive the printed form which you [fol. 210] finally made out and filed as your application for a permit under the grandfather rights, granted by the Commission——

A. You mean the date?

Q. About when?

A. When I was applying for them. They give them to you to fill out.

Q. Was that at one of your first visits?

A. I would say that if my memory is correct, I think the forms were not ready. We had to go back. It was not just walking in and getting something. I made a couple trips and wound up with them.

Q. You finally got some results?

A. I finally got something to fill out.

Q. Did anyone assist you in filling it out and if so, who?

A. I can't say just who. I did most of it myself. I asked their advice down there and they would tell me; that is all.

Q. By that you mean who?

A. The people who work for the Commission. Mostly Mr. Petritz if I am permitted to use his name.

Q. Certainly.

A. He just said: You have to get this and that, and that is what I did.

Mr. Stephens: May it be understood we have a continuing objection to any repetition of conversations with Mr. [fol. 211] Petritz so that we won't be interrupting all the time.

Exam. Sweeney: Yes.

Mr. Stephens: So that we may preserve our rights.

Mr. Blanchard: I will try, Mr. Examiner, to limit the reference to Mr. Petritz only to instructions and directions which Mr. Petritz as a representative of the Bureau, gave to Mr. Nelson.

Mr. Stephens: You mean which the witness alleges. You can't characterize Mr. Petritz did that, and I don't want it to appear on the record.

Mr. Blanchard: I resent your insinuation that my witness is not telling the truth.

Mr. Stephens: I am not saying that. But you can't make the statement. The witness said Mr. Petritz said that.

Mr. Blanchard: I won't argue but I made no such statement. What I am going to offer the witness is what is in Docket MC-1194, and a copy of the application which is found in that docket in order to identify what the witness is talking about.

By Mr. Blanchard:

Q. When you were preparing this application, did you observe anything about the form in which it was printed which was not pleasing to you?

A. Which was what?

Q. Any thing in the printed part of the form which you didn't particular- care for?

Mr. Scanlan: I object to that.

[fol. 212] Mr. Stephens: What difference does it make whether it was pleasing or not pleasing?

Mr. Blanchard: I will change the question: As to which you inquired from the Commission?

A. I am confused now. I don't know what you are talking about, what you are asking.

By Mr. Blanchard:

Q. You have referred to the fact you said you didn't want any part of the common carrier status.

A. I told the commission that I didn't want any part of it. I wanted to be a contract carrier.

Q. And that was your application which you filed for a contract carrier?

A. Yes.

Mr. Blanchard: Let the record show the witness is looking at a copy of the application which appears in MC-Docket 1194.

May we suspend with Mr. Nelson now, and let the final witness for the other side go on?

Mr. Scanlan: Why don't we conclude. Why don't you finish with your witness on direct examination?

Mr. Stephens: How many days are you allowed?

Exam. Sweeney: I have two days and if you want to run Saturday, we can do that, too.

Mr. Blanchard: I still want the record to show that but for my accommodation in going out of order, this witness's testimony would all follow my objection and would [fol. 213] be offered only if my objection is overruled by the Examiner.

Mr. Cohn: We understand.

Mr. Blanchard: The Commission has offered in evidence a photostatic copy of what purports to be an affidavit which you signed and which you submitted as part of the proof accompanying your application and which also appears in Docket MC-1194.

Mr. Lillie: It is not an affidavit; it is just a statement.

Mr. Blanchard: A statement, yes. Thank you, Mr. Lillie.

By Mr. Blanchard:

Q. And I will ask you to state if you know or recall who prepared that statement?

Exam. Sweeney: Is that the only statement you have? Is that sufficiently identified?

Mr. Blanchard: That is the only statement of this witness in Docket MC-1194 except the application itself.

Mr. Lillie: It is part of Exhibit 1, here.

Mr. Blanchard: It is in the record here, yes.

The Witness: What did you ask me?

Mr. Blanchard: I said to state if you recall who presented the paper for your signature.

A. It was given to me in the Commerce Commission office. Am I permitted to mention Mr. Petritz' name?

Exam. Sweeney: Yes.

A. (continued) He gave it to me and told me to read it and then to sign it.

By Mr. Blanchard:

Q. Did you raise any question as to any of the state-[fol. 214] ments contained in that affidavit at the time?

Exam. Sweeney: It is not an affidavit.

Q. (continued by Mr. Blanchard) The statement. Thank you for correcting me.

A. The only statement that I objected to was the fact that he said I won't have Walgreen alone, and the answer to that was that of all the evidence I had supplied, it was only necessary to have one contract, one shipper, to prove I was in every state, to give me this authority.

Q. And was anything said at that time about whether or not relying upon a single contract would in any way affect your opportunity to become a contract carrier instead of a common carrier?

Mr. Stephens: I object to that. This is trying to vary the contents of a written document, with a man who is dead and it doesn't give us a single opportunity to defend the work of a pretty good man in the employ of this Commission.

Exam. Sweeney: Off the record.

(Discussion off the record.)

Exam. Sweeney: On the record.

By Mr. Blanchard:

Q. Did you at any time make any inquiry as to what would happen to the other customers you had been serving if you limited your proof to one customer?

A. I was told I had one contract on file; all I had to do was get another contract from anybody in the same terri-[fol. 215] tories I was hauling for, and what I was asking for was miscellaneous merchandise; it was everything I had been hauling. That is what I asked for.

Mr. Blanchard: That appears in Docket MC-1194?

Mr. Scanlan: I assume he is going to give the answer that he got this information from Mr. Petritz. However, that wasn't incorporated in the question, and I move that the answer be stricken. The person with whom he had the conversation was not specified; the time was not specified; the place was not specified, all of which are elements that should be incorporated in a question, none of which were.

Exam. Sweeney: Can you supply that information?

Mr. Blanchard: I was exactly going right into, in the next question, those very questions Mr. Scanlan has anticipated.

Exam. Sweeney: Proceed, then.

By Mr. Blanchard:

Q. Where was this statement made to you and by whom?

A. You mean where I signed this thing, and where this conversation took place?

Q. Yes.

A. In the Commission's office. I sat at a desk just like this.

Q. And about what time with reference to signing the application?

A. That could have been a long time afterwards. When it came back, when he took a statement, or three or four [fol. 216] months or maybe five months, I don't know.

Exam. Sweeney: Who told you that?

The Witness: What is that?

Exam. Sweeney: The statement you have just made. Your answer to the last question. You had an answer in which you said you were told.

The Witness: When I was sitting at the desk with this.

By Mr. Blanchard:

Q. Talking to whom?

A. To the Commission, Mr. Petritz; he is the guy who gave me this, and we talked about the last item.

Mr. Scanlan: I assume my objection will be overruled but I move that the entire testimony be stricken, due to the fact that it was not held——

Exam. Sweeney: Your objection still stands.

By Mr. Blanchard:

Q. Did you at any time between the time you first learned that Federal regulation of motor carriers was enacted law and the time you finally filed your application, employ an attorney to represent you and protect your interests in this case?

A. I never had one.

Q. Why didn't you hire an attorney?

Mr. Scanlan: I object as incompetent and irrelevant and immaterial.

Exam. Sweeney: Objection overruled.

The Witness: Am I supposed to answer?

[fol. 247] Mr. Blanchard: Yes.

A. I didn't have any money. I mean, we were struggling along there. Money doesn't grow on trees to hire lawyers if you don't need them. I had to hire one now, though.

By Mr. Blanchard:

Q. Upon whom did you rely then?

Mr. Stephens: I object as a volunteered statement and move it be stricken, and not responsive to the question.

Exam. Sweeney: Strike that last statement.

Mr. Blanchard: You are not striking the answer: I didn't have any money? I asked him why he didn't have a lawyer.

Exam. Sweeney: The last statement wasn't responsive.

By Mr. Blanchard:

Q. Now, among the various people you served, was there any account you had which you more or less regarded as a blue ribbon account?

A. I always felt Walgreen was my blue ribbon account. I went to the same church; I knew them personally. They started with nothing; they helped me along. My wife taught his children in Sunday School. It was a friendly family relationship and we got along very well.

Q. How long had you been serving him at the time you filed Exhibit 1?

A. Shortly after the time I went into business. They were right across the street from me.

Q. That was when?

A. The fore part of 1919 when I came out of the army.

[fol. 218] Q. Did your operation of your warehouse have any effect or bearing upon your ability to serve them as a motor carrier for hire?

A. Yes; their space was scarce and we had a warehouse, and they used it along with other people.

Q. They used it in what way?

A. What people use warehouses for. You send things in and take them out.

Q. How would things for Walgreen come into this warehouse and go out?

A. In the beginning most of it was by carload. The first carload came from California, Veronica water, and from then on some came by trucks, some came in by our own trucks, and went out by our own trucks; some came in by other trucks and went out by other trucks.

Q. Did you render similar services to other people besides Walgreens?

A. The A. C. Drury account has been with us as long as Walgreens and we still have it.

Q. How about the sugar account; was that handled the same way, carload in and distributed out through the warehouse?

A. That is true but that wasn't handled the way these accounts were because that is when they weren't using sugar for sweetening coffee.

When prohibition came they cancelled it.

Q. Now, speaking of your total interstate business now [fol. 219] which you transported between points in one state and other points in another, as of 1935, what percent of that business would you say was consigned to drug stores?

A. I don't quite follow you.

Q. I want to eliminate your local cartage work; is that clear?

A. In just the year 1935?

Q. About the middle of 1935. What was the going percentage about that time?

A. That would be hard for me to say. I can't remember exactly what we did in 1935 but I will say at all times it may be——

Q. How much of it did you deliver to drug stores or drug store warehouses?

A. It wouldn't be half.

Q. Less than half?

A. I don't know; it is in that neighborhood.

Q. I believe the first document you ever received from the Commission following the filing of your application was what is called a compliance order; is that correct?

A. I would have to see it. I don't know.

Q. Did you at some time following the filing of your application for a permit for a contract carrier receive an Order from the Interstate Commerce Commission similar to that which I have just laid before you for your inspection?

A. This says I have complied with what they want me to do.

Q. Didn't it define what you were entitled to haul and [fol. 220] direct you to file your tariff and insurance and to do the things that you had to do?

A. Yes; it says new and used store fixtures, new and used stock in trade of drug stores, and it named the states in which I was, and I got one of these things.

Q. You did receive, then, a copy of that Order?

A. Yes; this might be it. I don't know.

Mr. Blanchard: I will has to have a duplicate copy marked Exhibit 5. This is Duplicate Docket MC-1194.

(The document referred to was marked Respondent's Exhibit 5, Witness Andrew G. Nelson, for identification.)

By Mr. Blanchard:

Q. Now, following the receipt of that Order did you file a schedule of minimum rates or a tariff?

A. Yes, I did.

Q. Do you have a copy of that tariff here?

A. I don'- have one.

Q. I hand you a document marked MF I.C.C.-1, and ask you if that is the tariff, or a copy of the tariff, which you filed with the Commission after receiving the Order marked as Exhibit 5?

A. Yes, that is.

Q. And I hand you a document which I ask to have marked Exhibit 6, and ask you if that correctly reproduces the tariff which you filed?

A. Yes.

(The document referred to was marked Respondent's Exhibit 6, Witness A. G. Nelson, for identification.)

[fol. 221] Mr. Blanchard: For the purpose of the record I have a copy of the tariff which is 2 pages. To avoid the space in the record, I put both pages on one page, and so indicated in the exhibit of which you have copies.

By Mr. Blanchard:

Q. Now, I notice in this tariff, Mr. Nelson, there is no reference whether the charge applies to a loaded movement or an empty movement, or what. It is just so much per hour?

A. That is right.

Q. How did you bill your customers that you served under your tariff?

A. Under the tariff or before the tariff?

Q. Under the tariff?

Mr. Scanlan: It is a schedule.

Mr. Blanchard: It is a schedule.

A. You mean after this is in effect, not before?

By Mr. Blanchard:

Q. Yes; how did you bill a man that is charged the amount named in this tariff?

A. If they called up and they used a truck from the time it went until it got back we charged them. Whether it was loaded or empty didn't mean anything.

Q. Did you apply the charges named in this schedule to your service for Walgreen Company?

A. They were minimum charges and in a great many cases we got more than the minimum.

[fol. 222] Q. But in connection with the Walgreen movement was your return load usually empty or not?

A. Not usually. But you are talking about after 1935?

Q. Yes.

A. After this is in effect?

Q. Yes.

A. By choice, they were willing to pay for us coming back so that it wouldn't interfere with our schedule, so they paid both ways.

Q. State what was the condition; if you brought one truck back from the Walgreen Company loaded and another empty, was there any difference in the charge you received?

A. No, the time taken for loading and unloading, but there was no other difference.

Q. You were serving at the same time, I believe you said, customers other than Walgreen. Did they all pay you on the same basis shown on your schedule?

A. Are you talking about after 1935 or before 1935?

Q. After 1935; immediately after.

A. That was a minimum charge. They paid that or more. It was all by the hour.

Q. Did you charge everybody by the hour?

A. After 1935 when I was operating on this?

Q. Yes.

A. Yes.

[fol. 223] Q. How did you charge, before 1935? Did you charge everybody by the hour?

A. No, the trucking business wasn't that way. If a guy wanted a load to Milwaukee, it was either $90, $100 or $40. It all depended on what you could get. Competition covered that. There was no set pattern. Of course, you knew what it cost you and you got all you could; that is all.

Q. Did the shippers with whom you made such contracts pay you the same thing for when you came back empty?

A. No; they just make a deal, do this or that, and that is it, for so much money.

Q. What did you do then when you took such a contract then with regard to the return rate?

A. We scoured around, trying to get a load to come back with from anybody we could get it from.

Q. And in supplying yourself with this return movement, do you recall any of the commodities you used to haul coming back from some of those trips?

Mr. Scanlon: I object. First of all, the best proof would be obviously the bills of lading and delivery sheets, and other documentary evidence and I think it is highly improper to attempt to introduce this type of evidence at this time.

Mr. Blanchard: I would be happy if Mr. Scanlan would tell me what bills of lading or shipping tickets were required for a trucker moving stuff in June, 1935.

[fol. 224] Mr. Scanlan: I don't know what were required, but they had them.

Mr. Blanchard: The witness has stated they were submitted to the inspectors for the Commission. He also stated they were destroyed and to verify his recollection, he searched his warehouse in the last two or three days and can't find them.

Mr. Stephens: He has also stated he was a contract carrier for the Walgreen Company and for it alone.

Mr. Blanchard: Is there anything wrong with that statement?

The Witness: Who is asking me what?

Mr. Blanchard: I am asking you.

Exam. Sweeney: We have a prior question that has not been answered. Objection overruled. Repeat the question.

(Question repeated as follows:

"Q. (By Mr. Blanchard: And in supplying yourself with this return movement, do you recall any of the commodities you used to haul coming back from some of those trips?")

A. Paper from Michigan; new furniture from Michigan because we more or less had a little contact there, but it seems that there were all kinds of different things. We would just run to the warehouse and if they had a load going to Chicago we took it; that is all.

Mr. Lillie: That was prior to 1935?

The Witness: Yes; all the way from the time that I have been in business up until 1935. That was a common way [fol. 225] they operated; there was nothing unusual about that.

By Mr. Blanchard:

Q. That is, there were loads that you have just described, were they, for any of the customers whose names you read into the record from the list you had prepared?

A. They might be for anybody. I wouldn't know.

Q. But it was a transportation service which you were rendering——

A. If anybody wanted it.

Q. Did you at the time of filing your application attach to the application certain of your delivery slips?

A. Yes, I was told I needed one for each state and we have got them and attached them to them.

Q. Who told you that? Go ahead until stopped by an objection.

A. Am I supposed to tell them?

Exam. Sweeney: Yes.

A. (continued) Mr. Petritz said I would have to get 10 tickets from each state.

Mr. Stephens: I think the witness has heard from you, Mr. Examiner; you can tell Mr. Petritz's name.

Exam. Sweeney: Yes.

The Witness: From here in?

Exam. Sweeney: Yes.

By Mr. Blanchard:

Q. And did you select those from a large number of other similar tickets which were available?

A. Yes.

Mr. Scanlan: There is no evidence that there were large [fol. 226] numbers of tickets.

By Mr. Blanchard:

Q. Were there tickets showing transportation for other people, of other commodities, filed in a shop?

A. Yes.

Q. About how many?

A. There is a number there.

Q. What is the first number in the Application?

A. 29,827.

Q. And your shipping tickets were serially numbered?

A. Yes.

Q. Beginning with No. 1?

A. I suppose when we bought the machine, it started with No. 1.

Mr. Scanlan: You don't know whether it started with No. 1. They could start at 29,000 or 1,000 or 10.

The Witness: We bought the machine. We might have started with 100, but not 1000.

By Mr. Blanchard:

Q. About how many tickets, if you can remember, covering movements in the six months prior to July, the 1st of July, 1935, did you show to the Commission's inspectors when they came to your office that time?

A. We keep them in a binder and it is about this high (witness indicates with hands).

Q. About that high is about 10 inches, is it?

A. About that high.

Q. Nobody is going to know unless you indicate how high it is.

[fol. 227] A. I think about 8 inches; it is a regular file.

Q. What are the other dimensions?

A. It covers the ticket completely, which is probably 4 or 5 by 7, or something of that type.

Q. And was this 8-inch receptacle full of tickets that you submitted to him?

A. There are always some of them full there. We keep our tickets that way.

Q. And how many such receptacles did you make available to the Commission at the time of the inspection?

A. All that were handy or whatever he asked for.

Q. Was it 55 or 2?

A. Receptacles?

Q. Yes.

A. There wouldn't be over 2 or 3 there.

Q. How many of those sales slips according to your best recollection would cover transportation to drug stores?

A. I would say under 50 percent.

Mr. Blanchard: You may inquire. Do you wish this other witness to go on now? I would like to get it on if I can.

Mr. Diehl: Off the record.

Exam. Sweeney: Off the record.

(Discussion off the record.)

Exam. Sweeney: On the record.

Mr. Cohn: Mr. Meyer, please take the stand.

[fol. 228] Elmer Meyer was sworn and testified as follows:

Direct examination.

By Mr. Cohn:

Q. Will you state your name and place of residence?

A. Elmer Meyer; 2010 E. 77th, Chicago, Illinois.

Q. What is your present occupation, Mr. Meyer?

A. Chief tariff compiler and member of the Standing Rate & Tariff Committee, Central Motor Freight Association of Illinois.

Q. How long have you occupied that position?

A. Two weeks.

Q. Prior to that time what was your business or occupation?

A. Assistant to the traffic manager at Rexall Drug.

Q. Prior to your position with the Rexall Drug Company, did you have any other experience in transportation rate matters?

A. Yes; I went into the traffic and transportation work in 1929 and at that time was in the Freight Rate Audit

Bureau. After that I went with the Truck Line to publish tariffs and also handle the big quotation desk there.

Mr. Blanchard: What was that truck line?
The Witness: Keeshin Motor Express.

By Mr. Cohn.

Q. That is a common motor carrier?

A. Yes. After that I went with the Central Motor Freight Tariff Bureau and I went in there first as assistant tariff compiler.

[fol. 229] Q. When was that?

A. In 1939, and I wound up there as chief tariff compiler, which position I held for 3½ years.

Q. Until what day?

A. It was in 1943, in the spring of 1943.

Q. Then what did you do?

A. I spent a number of years on the road as a salesman.

Q. Was that in connection with truck transportation?

A. No, it wasn't.

Q. It was an unrelated business?

A. Yes; but intermittently there I did compile a number of tariffs but not too much at that time.

Q. In motor truck transportation?

A. Yes.

Q. Then your next experience with the truck transportation tariff field was your employment with the Rexall Drug Company?

A. They had not only truck but also rail and water.

Q. What were your general duties as assistant to the traffic manager of Rexall?

A. I handled all rate matters, including auditing of freight bills, everything concerning freight rates.

Q. What is the business of Rexall Drug Company?

A. Wholesale distributors.

Q. And to what type of outlets do they distribute?

A. Drug stores.

[fol. 230] Q. And do they distribute the commodities which are handled in drug stores?

A. That is right.

Q. And where were you located in connection with your duties with the Rexall?

A. 2321 West Pershing Avenue.

Q. Is that the location of a warehouse of Rexall?

A. Yes, warehouse and Chicago offices.

Q. During the time you were connected with the Rexall Drug Company did you become familiar with the terms used and the common understanding of such terms in the drug industry?

A. Yes, I did.

Q. Particularly in connection with shipment by truck?

A. Right.

Q. And what you are stating here is based upon your experience and your personal appearance, as your own opinion and you are not appearing for any rate bureau?

A. That is right; it is my own opinion.

Q. Does the term "stock in trade of drug stores" have any special or limited meaning in the drug industry?

A. It has a very limited meaning.

Q. Can you explain the meaning of stock in trade of drug stores as used in the drug industry?

A. Well, stock in trade of drug stores, I would consider that to be the merchandise or drugs held on the shelves, to [fol. 231] be sold directly to the customers, which exclude soda fountain stuff and things like that.

Q. You would exclude those items such as are sold over soda fountains, which are consumed on the premises; is that the distinction?

A. That is right, because even though the articles going into the drug store for the soda fountain may go in there under one term, when it is being sold it becomes another product entirely.

Q. Now, is there a broader term that is used in connection with items handled in drug stores?

A. Yes.

Q. What is that term?

A. Drug sundries and supplies.

Q. And what would drug sundries and supplies ordinarily be when applied in the trade to drug stores?

A. That would include those articles which are other than what is normally considered as stock in trade. In other words, the sundry type of thing like all the other articles that are sold in the drug stores, which the average person walking down the street, possibly wouldn't even consider to be possible to be bought in a drug store.

Q. Can you give us some type of those items which would be considered as drug sundries?

A. Some are toys; some small electrical appliances, and numerous other articles.

[fol. 232] Q. And these articles which you have just now enumerated would not be considered as stock in trade of drug stores?

A. No, because they could not be found in, I would say, the majority of drug stores. They would be more or less an accessory line,—leaders, a lot of these.

Q. Specifically, are the following commodities ordinarily embraced in the term: stock in trade of drug stores as used in the industry: 1, storage batteries?

A. No.

Q. Cabinets, lockers and storage wardrobes?

A. No.

Q. Canned vegetables?

A. No. That is based on what I have never seen.

Q. Based on your experience?

A. Yes, but it is possible to go from New York to San Francisco but there are one or two where those articles might be found.

A. Are those stores what we would say in the ordinary sense are drug stores?

A. Yes; they are drug stores.

Q. Would fiber-board boxes be embraced in the term: stock in trade of drug stores?

A. No.

Q. Canned pickles, preserves, jams, jelly, and items of that kind?

A. No.

[fol. 233] Q. What about the item of fertilizer?

A. No.

Mr. Cohn: That is all I have.

The Witness: Not the packed kind.

Mr. Cohn: This completes our direct examination.

Mr. Stephens: I think if there should be any examination, it should be my examination of this witness, which is not a cross examination.

Mr. Cohn: Absolutely.

Mr. Blanchard: I agree with that.

The Witness: May I confine my last statement, or qualify it, rather?

Exam. Sweeney: Yes; you may qualify your last statement.

The Witness: As far as fertilizer goes, let me say this: It would not be considered a stock in trade.

Cross examination.

By Mr. Blanchard:

Q. My question is: What type of packages can you buy fertilizer in, except in bags?

A. Various packages.

Q. Such as what?

A. Such as cartons.

Q. What kind of fertilizer do you buy in cartons?

A. There can be fertilizer for house plants.

Q. You mean those little plant tabs or something of that sort?

A. Regular fertilizer.

[fol. 234] Exam. Sweeney: Is the direct examination concluded?

Mr. Cohn: Yes.

Mr. Blanchard: I so understood.

By Mr. Blanchard:

Q. Now, I wasn't quite clear what time you started to work at Rexall?

A. It was May 4, 1953.

Q. So that there were about 10 years there that you were on the road as a salesman?

A. About 8 years, I believe. No, it was closer to ten years; that is right

Q. Now, where are we to understand you draw the line between what you say is stock in trade of drug stores, and drug sundries? What is the dividing line?

A. The dividing line there would be very fine. If a person could put down a definite line, but the stock in trade, as

I would interpret it would be: stock, of course, means merchandise. Now "in trade" would be the articles sold to the public because, after all, that is to whom they do sell it. That would include those articles which are normally carried in stock for all drug stores.

Q. Do I understand, then, that if you found one drug store out of 100 that didn't handle electric toasters, you would strike electric toasters from that one drug store?

A. No, that is normally carried by all drug stores.

Q. What do you mean by normally?

[fol. 235] A. In other words, if you were walking down the street and were to say: Well, I can get this article in the drug store; you can't get a toaster in every drug store. You wouldn't normally consider a drug store as handling toasters, although today some of them do.

Q. What is your authority for saying that you do not ordinarily find electric toasters as typical, in a drug store?

A. A toaster, if it is not electrical, becomes hardware. If it is an electrical toaster, then it becomes an electric appliance. I would normally assume that the electric appliance store would be the proper place to buy it, although you can get them in a drug store.

Q. Do you know, as a matter of fact, that you can buy electric toasters in almost every drug store in this area? Haven't you repeatedly seen them offered for sale in almost all drug stores?

A. Not in all drug stores. A drug store, in itself, is what the term implies, and there has to be a line drawn somewhere, and as far as tariff publication goes, they have seemed to draw the line on that basis.

Q. Now, you are speaking of the ordinary freight tariffs?

A. Yes.

Q. Do you know of any of our freight tariffs which publishes rates on stock in trade of drug stores?

A. Not stock in trade, but I do of sundries.

Q. Are the terms of all the railroad tariffs alike in even [fol. 236] defining sundries?

A. No.

Q. Each railroad has its own idea?

A. Not each railroad.

Q. Each publishing bureau?

A. Not even each publishing bureau.

Q. How many different ones will you find?

A. That is a good question.

Q. Pardon me.

A. That is a good question, and one which would be hard to answer for this reason: I don't know how many tariffs are published.

Q. You have seen numerous different groupings in the mixed carload lists for drug stores?

A. Not in the mixed carload lists for drug stores because I have never yet seen a carload of freight going to an individual drug store.

Q. Have you seen it going to drug store warehouses?

A. I don't believe you will find very many drug store warehouses, if any.

Q. Don't you find such articles as baby food moving in the drug line?

A. Yes.

Q. Face cream and cosmetics?

A. Face cream and cosmetics, yes. That is stock in trade.

[fol. 237] Q. Did you ever see one that had any hardware items in it?

A. A drug list?

Q. A rail freight rate?

A. Drug sundries, yes; not stock in trade, though.

Q. Is there any tariff you ever saw which publishes rates on stock in trade of drug stores?

A. No.

Q. Rail or motor?

A. No.

Q. You gave us the definition of your conception of stock or stock in trade. From what authority did you derive that definition?

A. We had quite a discussion about that one time, and I went to Webster's Unabridged Dictionary and the encyclopaedia.

Q. In other words, you think this should be interpreted by ordinary reference to an ordinary dictionary?

A. I don't believe you would consider Webster's an ordinary dictionary.

Q. Well, let us say an ordinary, high grade dictionary?

A. Well, let us put it, the almost universally used one, for such things.

Q. And that is what you are basing your interpretation on,—on what the dictionary says?

A. Also with the experience I have had with the various articles, knowing what moves and, well, let us say what moves heavily and what moves more or less lightly and seasonably.

[fol. 238] Q. You don't mean to say, I hope, that nothing moves into a drug warehouse in carload lots except articles moving on these rates or drug sundries?

A. No, drug sundries' rates are not in carloads.

Q. But there are carloads moving to drug warehouses, of electric toasters?

A. Are you speaking of drug warehouses or drug stores?

Q. Drug warehouses?

A. There are carloads moving into drug warehouses.

Q. Aren't there carloads of numerous kinds of freight described by numerous terms in the railroad tariff all moving into drug warehouses?

A. I believe that would be restricted to the article which goes into it and the rates would be applied according to the descriptive terms of that particular article.

Q. That is what I say. If a carload of cement was going to the drug warehouse, it would move the cement rate?

A. Would a carload of cement move into a drug warehouse?

Q. I said if it did, would it move the cement rate?

A. If it did; yes.

Q. If it was a carload of electric flat-irons, it would move at the rail rate applicable to flat-irons?

A. If any drug store would get a carload.

Q. And a carload of straw hats, it would move at the rail rates applicable to straw hats?

[fol. 239] A. That is right.

Q. Any article moving to a drug warehouse would take the rate applicable under the rail tariff?

A. That is true, but you are assuming there are drug warehouses.

Q. I am assuming any article moving to a drug warehouse would take the rate applicable to that article.

Mr. Stephens: I am submitting the question does bear out the witness. It is on the assumption there are drug warehouses.

Exam. Sweeney: The witness has said there are none.

By Mr. Blanchard:

Q. Where does Rexall Company keep their stock?

A. At 39th and Western.

Q. What do you call it?

A. A branch office.

Q. You do use it to receive carload shipments and distribute it out to your stores?

A. Yes. There is a difference there between that warehouse and a drug store.

Q. Well, then, what do you call it? I call that thing a drug warehouse. What do you call it?

A. Just a warehouse.

Q. Well, now, I will change my question: Any article moving into that warehouse for use by the Rexall Drug Company by rail, would move at the rail rate applicable to that article?

A. That is right.

[fol. 240] Q. That rate would not be difference because it was going to your warehouse than it would if it was going to the Army Storage Depot next door, would it?

A. It depends on the article.

Q. If you have a rate on electric toasters, does that rate vary on one load going to your warehouse and another load which is switched next door at the Army Storage Depot?

A. Yes.

Q. Wouldn't that be true of any article I would name, if it went to the siding next door?

A. No.

Q. What difference would apply?

A. Soda ash, if it goes into a warehouse, that can move under two rates, depending upon the use of the article.

Q. And the degree of refinement?

A. Not necessarily the degree of refinement, either; the use of the article.

Q. If you had two carloads of soda ash of the same grade, and the same quality, would the rate on one carload to a warehouse be different than the rate on the identical commodity going to the Army Depot barring government rates?

A. Let us not tie it down to the Army Depot but to any two destinations.

Q. You tie it down anyway you want; I want to tie it down to the Army Depot.

[fol. 241] Mr. Cohn: You might have a Section 22.

By Mr. Blanchard:

Q. I said barring government rates.

A. Well, again, it would depend upon the use of the article.

Q. And your conception of freight rates maybe might depend in their making on the use of the article?

A. That is right. They are not usually made that way. They are sometimes determined that way, and in some cases the shipments move based on the use of the article. Another good example of that is hog rings. If they go to a hardware store, they are rated as hog rings. If they go to an automobile manufacturer, they are automobile parts.

Q. But you are working under two tariffs, aren't you, one describing automobile parts and the other one describing only hog rings?

A. Sometimes they are both in the same tariff.

Q. What do they call them when they go to automobile factories?

A. Auto parts.

Q. What do they call that particular part?

A. Auto parts NOI, by name.

Q. But it is still a hog ring?

A. That is right, but it becomes the article which is used.

Q. Did you find any definition in Webster, or in any other dictionary, of the term: stock in trade of drug stores?

A. Not the full term.

Q. You found definitions of individual words used in [fol. 242] that term, is that correct?

A. Yes.

Q. And putting those individual word definitions together, is the basis for your opinion, is that correct?

A. Yes.

Q. Well, I gather, Mr. Meyer, that it is not your intent to limit the use of the term stock in trade of drug stores merely to the apothecary sense of drug store; you don't claim that, do you?

A. The apothecary is known as the prescription department.

Q. Prescription and proprietary medicines?

A. No.

Q. You admit it does go beyond that?

A. Yes, because toilet preparations would be a stock in trade.

Q. And you have given me the best dividing line of which you are capable between where stock in trade of drug stores stops and your definition of drug sundries begins?

A. I don't think I would use the word stops, because the line is so fine there that it would revert back to useage, or let us say what stores do carry, because in one part of the country you have quite a difference in order to be considered stock in trade than what you might have in another part of the country.

Q. Are we concerned in what drug stores carry in any territory except that in which this carrier is operating?

Mr. Stephens: I think in fairness to the witness your [fol. 243] question was broad.

By Mr. Blanchard:

Q. I will limit it to that.

A. How close do you want to limit it? Where is the carrier operating?

Q. You don't know where he is operating.

A. Not specifically. I do know that it is in this general area of 600 miles.

Q. Your only experience in the drug business is what you have told us about when you were with Rexall?

A. Yes, with the exception of the tariff publishing experience that I have had, in publishing direct a chemical and toilet preparations list or lists, drug sundries and drug supply lists.

Q. At the same time you were publishing lists of hardware articles, machinery tools, and everything else you find in the tariff?

A. Yes.

Q. But your only experience with a drug concern is that which you have outlined, with Rexall?

A. That is all.

Q. I want to ask you a hypothetical question. I want you to assume that we have two motor carriers; one has rights to transport stock in trade of drug stores; the other has rights to transport stock in trade to drug stores. Do those terms mean the same?

A. No.

[fol. 244] Q. What is the difference?

A. The "of" and the "to".

Q. What difference does that make in the breadth of the authority?

A. The word "to", it would be stock in trade of anything to a drug store. The stock in trade of a drug store would be the stock in trade of that drug store.

Q. Which carrier would have the broader authority,—the one who had a right to haul stock in trade of drug stores, or the one who had the right to haul stock in trade to drug stores?

A. To drug stores, would be the broadest.

Q. He could haul more goods?

A. Yes.

Q. Although the term stock in trade is used in both descriptions?

A. That is right.

Q. The only difference is one may haul stock in trade of and the other may only haul stock in trade to drug stores?

A. Yes.

Q. And you think the latter is the broader term and permits the transportation of more freight?

A. Yes.

Mr. Cohn: The latter which you consider broader is of drug stores?

The Witness: No, to drug stores, is broader.
Mr. Blanchard: That is all.

[fol. 245] Redirect examination.

By Mr. Stephens:

Q. Do you recall I asked the reporter to read back a question which Mr. Blanchard asked you: the basis of your opinion being the references to the dictionary; was that the only basis of your opinion in your conclusion?
A. No, as I said at the time, it was through the other experiences I have had.

Mr. Stephens: That is all.
Exam. Sweeney: Could I ask you one question?
The Witness: Yes.
Exam. Sweeney: Would you say there would be any difference in the terms of stock in trade of drug stores, and stock in trade of drug stores to drug stores?
The Witness: The stock in trade of drug stores to drug stores? That would be from one drug store to another.
Exam. Sweeney: How do you figure that out?
The Witness: It is stock in trade of drug stores to drug stores. That would be the same as the one without it, to drug stores.
Exam. Sweeney: In other words, both the terms I have just stated mean the same, in your opinion?
The Witness: Yes.

Recross examination.

By Mr. Blanchard:

Q. The Central Motor Freight Bureau is the bureau by which you are employed, I believe?
[fol. 246] A. Yes.
Q. And that Bureau is a party to this case?
A. No.

Mr. Cohn: No, they are not, and this witness is not speaking for the Bureau, or as an employe of the Bureau, and he so stated.
Mr. Blanchard: Somebody entered an appearance for the Central States Motor Freight Bureau.

Mr. Cohn: I don't believe so. That may have been in the I. & S. case. We haven't had that called yet; not in the Complaint case,—not in this case.

By Mr. Blanchard:

Q. Would you say that the opinion expressed by the Central Motor Freight Bureau as to what the term stock in trade of drug stores meant, was entitled to weight?

A. I would have to hear the opinion before I would answer that.

Q. In other words, if you didn't agree with it, it wouldn't be entitled to weight?

Mr. Stephens: I think that is an unfair supposition.

Mr. Blanchard: I was smiling when I said it.

By Mr. Blanchard:

Q. If you were informed that a person holding the same or a superior position to yours, in the Central States Motor Freight Bureau felt that the meaning of the words stock in trade of drug stores was different from yours, would you feel that perhaps you should reconsider your opinion of what it meant?

[fol. 247] A. I would still have to hear what their opinion was because I never in all my life have been a Yes man and I am too old to start now.

Q. So that my statement was correct: Under no conditions would you reverse what you have done unless you heard what that interpretation was?

A. Well, at any time, if I am shown where I am wrong, I have always been willing to admit I was done.

Q. Would you be willing to consider what the Central States Motor Freight Bureau had said?

A. Sure.

Q. Do you think it would be entitled to some weight?

A. They would be entitled to my opinion. Let us put it this way: if I heard what they had to say and if they could show me where my opinion was a little off I would be more than happy to reconsider.

Q. Well, the point is you would give it serious consideration, as a matter worthy of consideration?

A. Any other opinion other than my own is always worthy of consideration.

Mr. Blanchard: I think that is all.

Redirect examination.

By Mr. Cohn:

Q. Having in mind that the territory embraced in the permit of the Respondent is between points in Illinois, Indiana, Iowa, Kentucky, Michigan, Minnesota, Missouri, [fol. 248] Nebraska, Ohio and Wisconsin; having in mind that that is the territory embraced in the permit of this Respondent, would your testimony concerning your opinion as to the definition of stock in trade of drug stores be changed or varied in any manner?

A. No, because that is practically the same territory I had operated in, in the past year.

Mr. Cohn: That is all.

Exam. Sweeney: Off the record.

(Discussion off the record.)

Exam. Sweeney: On the record. You are excused; thank you.

(Witness excused.)

MOTION TO STRIKE PARTS OF EXHIBIT AND DENIAL THEREOF

Mr. Blanchard: I understand that with this last witness, the case of the Commission and the Interveners is now closed, and that side rests. At this time I would like to move to strike pages 1, 3 and 4 of Commission's Exhibit 1, on the ground that since the wording of the permit is not ambiguous or uncertain, that the Commission under the Seatrain case is without authority to consider events existing prior to the issuance of the permit and simultaneously with that, I move to dismiss the proceeding on the ground that no violation of the law has been shown as to any of the articles of transportation with which the record thus far concerns itself.

Mr. Lillie: If the Examiner please, Exhibit 1, to which he refers, was admitted without objection. It is a certified copy of the proceedings before the Commission in Docket No. [fol. 249] MC-1194, which is in evidence, and for that reason there is no ground upon which it can be stricken from the record at this time.

The question as to the lawfulness of the operations is a question of law, and the Commission has made a prima facie case on that subject, showing these items were transported, it is admitted they were transported, and *it* simply a question of law as to whether they come within the terms of the permit that was issued to the Respondent, and is the matter to be decided in this case.

Mr. Blanchard: I agree with counsel's statement that the issue is an issue of law. My objection goes to the consideration of any facts existing prior to the date of the issuance of the permit of this Carrier in 1942, on the ground that such recourse may be had only in the case of a permit, the terms of which are uncertain, ambiguous or obscure.

It is not that my objection goes to striking Docket MC-1194 or any other evidence of facts or conditions existing prior to the issuance of the permit, but of recourse to that in case of uncertainty or ambiguity in the permit.

Mr. Stephens: By the same token, if that motion should prevail, I would automatically move to strike all the testimony of the witness Nelson.

Mr. Blanchard: If that motion prevails, you won't get a chance to strike it; I will withdraw it myself.

Mr. Scanlan: Furthermore, Mr. Examiner, I think the [fol. 250] record will show that at the time Exhibit I was introduced in evidence and other matters incorporated by record into the proceedings, it was stipulated between counsel that that would be done.

Exam. Sweeney: That is correct.

Mr. Scanlan: And in view of that stipulation I submit the present motion is highly out of order.

Mr. Blanchard: The stipulation was made at the beginning of the hearing when the entire case with which we were being faced was not known. If some violation of law had been shown or some uncertainty or ambiguity had been shown, I would be the first to concede that we might go into these earlier matters, to find out and resolve the ambiguity, but my point is that no ambiguity having been shown, the Supreme Court decision in the Seatrain case and other decisions of the Federal court estops the Commission from going back and considering anything that happened back of the permit.

Exam. Sweeney: Your motions are overruled.

Mr. Blanchard: May the record note an exception?

Exam. Sweeney: That is not necessary.

Mr. Blanchard: And that I now proceed with rebuttal of these matters which I moved to strike, under protest and do not waive my position as to the certainty of the permit by so doing and my statement of offering evidence under protest applies to the testimony of Mr. Nelson as I indicated at the time.

Mr. Scanlan: Do you feel the direct testimony given [fol. 251] by Mr. Nelson is irrelevant and immaterial to the issues under the motion you just made?

Mr. Blanchard: The motion has nothing to do with it. Under the ruling of the Examiner, I must go into it, as I do without waiving my contention that nobody has the right to go back of the permit.

Mr. Scanlan: We have here a situation where Mr. Blanchard has moved to dismiss this case, in effect, when he has just placed Mr. Nelson on the stand and gone into some details as to the issues prior to the issuance of the permit. I am again directing my question specifically to Mr. Blanchard and asking in view of the motion you have made, do you consider the testimony of Mr. Nelson relevant and material to the issues.

Mr. Blanchard: It is relevant only because the Examiner has allowed the other side to go into facts which existed back of the permit. If the Examiner should be sustained by the Commission or the courts, I can't waive my opportunity to put in our side of that.

I think you will recall when I put Mr. Nelson on the stand, I stated that my motion should come first, but merely out of accommodation and for the saving of time, and the witness Meyer not being here, I agreed to go ahead, but still reserved the right to make the motion. Could I call Mr. Koehler? He will take only five or ten minutes.

Exam. Sweeney: Yes.

[fol. 252] ALBERT KOEHLER was sworn and testified as follows:

Direct examination.

By Mr. Blanchard:

Q. Your name is Albert Koehler?

A. Yes.

Q. You are here, Mr. Koehler, in response to a subpoena served on you?

A. Yes.

Q. What is your address?

A. 2025 Farragut, Chicago, Illinois.

Q. By whom are you employed?

A. Mr. F. K. Walgreen.

Q. In what capacity?

A. Manager of the inventory department.

Q. And as manager of that department what are your duties; what do you do?

A. Take inventory of the retail stores, set up the merchandise within the stores all over the country.

Q. Do your duties require a more or less continuous knowledge of what goods are being carried in stock at your various stores?

A. It must be up to date at all times.

Q. What kind of stores are your stores called?

A. Walgreen Drug Stores.

Q. How many such stores does your company operate in the state of Illinois?

[fol. 253] A. In the state of Illinois there are 138.

Q. In Indiana?

A. 8.

Q. Iowa?

A. 6.

Q. Kentucky?

A. 10.

Q. Michigan?

A. 10.

Q. Minnesota?

A. 13.

Q. Missouri?

A. 10.

Q. Nebraska?

A. 3.

Q. Ohio?

A. 10.

Q. Wisconsin?

A. 26.

Q. Making a total of how many stores?

A. 234.

Q. Insofar as the stocks carried in these stores are concerned, is there any substantial difference between the goods carried at one Walgreen store and another?

A. Not except for quantities.

[fol. 254] Q. Except for the quantities?

A. Yes.

Q. Do you carry at these stores, beer?

A. Yes.

Q. As a part of your stock in trade?

A. Where a license can be obtained.

Q. That is presumed, of course. And is the same true as to wines and malt liquors?

A. Yes, sir.

Q. Is it also true as to canned pickles, preserves, jam, jelly, fish and fruit juices?

A. Yes.

Q. You do carry these in practically all Walgreen stores?

A. The majority, in this case.

Exam. Sweeney: Do you carry fish?

The Witness: Dietetic foods and that kind of thing; and they carry all the different types of canned goods, including fish.

By Mr. Blanchard:

Q. How about cleaning compounds?

A. Yes.

Q. Canned meat and dog food?

A. Yes, sir.

Q. Candy?

A. Yes.

Q. Dry milk products?

A. Yes, sir.

[fol. 255] Q. Canned vegetables?

A. Yes, sir.

Q. Storage batteries?

A. We have had concessions on storage batteries from various auto supply houses.

Q. How about batteries for flashlights; aren't they considered batteries?

A. Those are considered a dry type of storage battery.

Q. In your duties do you also know what exists at your various stores in the way of fixtures?

A. Yes, sir.

Q. What is the fact as to the existence at Walgreens Stores of steel lockers in which employes may hang their hats and coats while at work?

A. It is mandatory in most of the states in which we operate.

Q. Would you say steel lockers of that type were a standard fixture in practically all Walgreen drug stores?

A. As close as we can to modernizing them.

Q. But some locker of that type is——

A. In practically all.

Q. What about fertilizer in bags? Do you handle fertilizer in paper bags?

A. We handle fertilizer in paper bags.

Q. In practically all drug stores?

A. Most of them.

[fol. 256] Q. Now, how many years have you been with Walgreens?

A. 31.

Q. What is the inventory which you take, an inventory of what, when you go to a store and take an inventory?

A. Of the merchandise contained within the store for sale to the public.

Q. Would it be correct to say that you inventory your stock in trade at that drug store?

A. Definitely.

Q. And would that inventory contain each article offered for sale in that store?

Mr. Scanlan: I would like to object to this type of leading question. I think Mr. Blanchard could very easily ask him what the inventory consists of, and not lead the witness.

Mr. Blanchard: I will be glad to. I thought it was so obvious that it wouldn't lead to an objection. I was leading.

By Mr. Blanchard:

Q. Now, barring new developments of new commodities, to what extent has the inventory of Walgreen stores changed in the past 10 or 15 years,—barring new things like television, that didn't exist 15 years ago?

A. Well, not too much, unless you went into self-service stores or to soft goods or some other types of items.

Q. The self-service store is a new or relatively old development?

A. A new development.

Q. It has been going on how long?

[fol. 257] A. Two years.

Q. How many such stores do you have?

A. 30, at the present time.

Q. The remainder are all the regular types of drug stores?

A. The conventional type.

Q. What was your answer, leaving out the self-service stores, as to the general type of commodity offered in the Walgreen drug store, and part of its stock in trade today, and the stock offered in the same store 15 years ago?

A. 15 years ago, it was about the same.

Mr. Blanchard: You may inquire:

Cross examination.

By Mr. Lillie:

Q. Mr. Koehler, when you testified that the Walgreen drug stores handled canned goods, you didn't mean that they handled the type of canned goods that are in grocery stores, for instance, in the large cans?

A. Some stores, yes, sir.

Q. Some stores do?

A. Yes.

Q. Which ones, if you recall?

A. Well, you take any of them, 95th & Western here, and 87th and Cottage; and we make specialty items out of those, and out of the city most of the large stores do handle sugar and grocery products as leaders.

Q. Do you have a grocery department in those stores?
[fol. 258] A. No; we handle them as leaders.

Q. Not as stock at all times, but on occasions?

A. As stock at all times, but that is the reason for handling the groceries.

Q. Principally the canned goods you would handle would be in the dietetic department,—small things of that nature?

A. Baby foods.

Q. They are more in line with the drug store operation?

A. Yes.

Q. And these other items which are handled in a few of the stores, would that they be more in the nature of sundries than ordinary stock in trade in that store?

A. No, we consider it regular stock.

Q. There are just a few items you use as leaders?

A. It covers probably about 50 or 60 items.

Q. By a leader, do you mean that is some commonly-used item that you sell at a reduced price to draw trade to the store?

A. Yes.

Q. You spoke of concessions. As I understand it, a concession is where you lease a portion of your store to some other concern where they put in their own stock and sell on your premises?

A. Yes.

Q. And are your cosmetic departments or some other department of that nature,—are they handled on that basis in some stores?

A. Nothing except this one type we used to have through-
[fol. 259] out the stores.

Q. What is that?

A. We had a Firestone agency at one time. Everything else was Walgreen.

Q. For instance, in this Firestone agency, as I am speaking now of the battery of the automobile type, a wet storage battery, that would have been sold by the Firestone agency then?

A. No; we took the money for it and handled it all the way through. They got a percentage of the sales of that particular item.

Q. But as I understand it, that was more or less on a consignment arrangement, that they belonged to Firestone and you handled the sale of them, is that it?

A. Well, it would probably be a combination of that. We bought them and handled them, and they guaranteed sales. They guaranteed sales but we actually purchased the merchandise from them on a guaranteed sale basis.

Q. That is, if you didn't sell them, they would take them back?

A. Yes.

Q. Now, these lockers, etc. that you use in your drug stores, are they affixed to the premises, or are they moveable?

A. They are moveable; they stand up.

Q. They stand by their own weight and are not bolted to the walls or anything of that nature?

A. That is right.

[fol. 260] By Mr. Cohn:

Q. The cleaning compounds are usually items carried in cans and referred to as cleaning fluid?

A. The compounds, yes. We sell the sweeping compound and some of those items in the stores, too.

Q. You don't handle the usual grocery conception of cleaning compounds, like detergents and dry compounds?

A. Oh, sure.

Q. Detergents?

A. Absolutely. We couldn't live without those.

Q. Now, these stores that you state where you handle these leaders, they are usually stores that are located in areas where you in order to meet the competition of the grocery line, carry these leaders?

A. Yes.

Q. Those are usually grocery items to meet the competition?

A. The stores around there that are competitive stores carry the same thing. Usually it is the other store that starts and we do it too.

Q. That is to get the customers into your stores, to buy from the drug line?

A. Yes.

By Mr. Scanlan:

Q. Mr. Koehler, you mentioned that certain of those items were handled by your store at 95th & Western. That is the one that is located across the street from the Plaza?

A. Evergreen Park.

[fol. 261] Q. Evergreen Park Plaza?

A. Yes.

Q. And that is a store of considerable size, is it not?

A. Yes.

Q. One of your largest stores?

A. Yes.

Q. And the other store you mentioned, at 87th & Cottage; that is also a new store and considerably larger than the average store of your company, and that is a self-service store, is it not?

A. Yes.

Q. Now, the type of merchandise of Walgreens, from the two stores, say, at 95th & Western, and 87th & Cottage, are not typical of the average Walgreen drug store, are they? They are much larger stores?

A. On today's market, no. On today's market they are considered different.

Q. They are considered different from your average stores?

A. Yes.

Q. The fact that you are handling such items as detergents and things like that, and more or less from a competitive standpoint in order to compete with grocery stores now handling tooth-paste.

A. You mentioned detergents. We have detergents, no matter what size store it is. Those are in every single store regardless of the size.

[fol. 262] Q. No; what I was talking about is the grocery item that you use as a leader.

A. Out of town we use more competitive items. I used those two in the city; there are other stores that do carry that, out of the city.

Q. Your canned pickles you were questions about, does your company handle and sell canned pickles to the retail trade?

A. Yes, sir.

Q. And that would be sold from a store such as the store located across from the Evergreen Plaza?

A. Not here in Chicago, but we would have it out of the city, in typical stores.

Q. Do you know, Mr. Koehler, whether or not the Andrew G. Nelson Company is presently transporting merchandise for Walgreens?

A. I am not acquainted with that.

Q. In your position as inventory manager, do you have occasion to see the trucks that bring the merchandise to and from?

A. No, sir.

Q. So you wouldn't be in a position to say that Mr. Nelson ever handled any of this type of merchandise for Walgreen?

A. Back in the *year* years when we were closing stores and I had to take care of the truckin-s, I did, but that would be many years ago.

Q. That would be when you were closing some of your smaller neighborhood stores, and doing away with those [fol. 263] and opening some of the larger stores?

A. We are opening and closing stores all the time.

Q. That would be a movement from one store to another store, or from one store to your warehouse?

A. A combination.

Q. It wouldn't be a movement of storage batteries from the Electrolite Company to your company, would it?

A. I wouldn't know. The only one I am acquainted with is in closing and opening the stores.

Q. You know of no instance where Andrew G. Nelson would handle a load of batteries from any battery manufacturers to your stores or warehouse?

A. I wouldn't know.

Q. Do you know where Andrew G. Nelson would have handled a truckload of beer from Blatz Brewing Company, or Schlitz, to any one of your stores or warehouses?

A. I wouldn't know.

Mr. Diehl: I object. The witness has indicated by his previous answers that he is not familiar with the transportation that takes place for his employer. He said that and Mr. Scanlan now is reading from a list, each of which will call for a No, because the witness has said not No, but "I am not qualified to answer that." I suggest, furthermore, that further questions along that line are objectionable.

Exam. Sweeney: Can you ask him if anything has been [fol. 264] hauled by Nelson?

Mr. Scanlan: I prefer to do it item by item, because there were certain items—

The Witness: We would prefer to get this hearing over; we are wasting time.

By Mr. Scanlan:

Q. Now, Mr. Koehler, if I were to ask you substantially the same questions concerning the various commodities that are listed in Exhibit 2 in this proceeding, would your answer be the same, and I now show you the document which has been introduced in evidence as Exhibit 2. That is, cartons of beer; cases of Bright Sail, pickles, jellies, canned meats, malt liquors, fiberboard boxes, cases of wine, cases of shrimp, cases of preservers—

Mr. Diehl: I now renew my objection and ask you to ask the witness if he knows anything about the present situation.

Exam. Sweeney: Will you examine Exhibit 2 and give your answer?

The Witness: Yes.

A. It is the same answer that I have answered and my answer to those that were asked would be: Yes; I would still maintain that those are items carried by Walgreen.

Exam. Sweeney: Take a look at the rest of the items.

Mr. Scanlan: My question was, did he in his experience of 31 years with Walgreen ever see A. G. Nelson handle any of these items to or from any store of Walgreen or to or [fol. 265] from any warehouse of Walgreen.

Exam. Sweeney: Let the witness look through Exhibit 2 at the commodities listed ans see if you can answer in the affirmative as to any of those commodities.

Off the record.

(Discussion off the record.)

Exam. Sweeney: On the record.

Mr. Scanlan: Do you understand the question now?

The Witness: It has to be these particular items from some other vendor other than Walgreen stores?

By Mr. Scanlan:

Q. Yes.

A. No.

Q. You never saw them perform any of that type of operation?

A. No.

Q. And the type of operation you saw Mr. Nelson perform, and when I say Mr. Nelson I mean the Andrew G. Nelson Company and its successor in interest, was from one of your stores to another store or from one of your stores to a warehouse, or a combination of that movement, is that correct?

A. That is right.

Q. Now, when you will open a new store; for example, when was *was* the store at 95th and Western opened up?

A. About a little over two years ago.

Q. Do you know whether or not Andrew G. Nelson transported any of the commodities which are shown in Exhibit 2 into that store?

[fol. 266] A. I couldn't answer.

Q. If I asked the same question about the store at 87th and Cottage, would your answer be the same?

A. It would be the same. I couldn't answer.

Q. If I asked the same question about the store at 87th and Cottage, would your answer be the same?

When a store is opened, such as the one at 95th and

Western, and 87th & Cottage, what is shipped from the warehouse to that store?

A. We have a combination; the warehouse only carries fast-moving merchandise and we move that directly from the warehouse to the store on our regular warehouse order pads, and then we have about 500 or better, outside vendors from whom merchandise is ordered and delivered directly to the store; therefore that is the reason I can't get anything tied down as to who does the hauling.

Q. In other words, as to the physical handling of these stores you have warehoused certain articles which will be turned over rapidly?

A. Yes.

Q. And those are the items which are shipped from your warehouse to the particular store which is being opened?

A. Yes.

Q. What would be some of those fast-moving items?

A. All the drug items, drug sundries, and commodities, and related items, and any of the special items that we [fol. 267] carry for sale to the public.

Q. And now what would be some of the typical items which would be shipped by the vendor?

A. It would be any kind of drugs again; toilet goods and sundries, and the same types of items.

Q. And items such as batteries would come directly from the manufacturer, is that correct?

A. As what?

Q. Automobile batteries?

A. That would be a direct buy.

Q. Tires; do you handle tires?

A. Yes.

Q. And your automotive supplies?

A. Yes.

Q. And those are shipped on a prepaid basis?

A. It depends on the terms.

Q. Generally speaking, are those shipped on a prepaid basis?

A. However; some of them are different. On some you have to have a certain minimum quantity or a certain weight to be shipped prepaid as I understand what you mean by prepaid.

Q. In other words, where the cost of the transportation is included in the price of sale.

A. A lot of shipments are collect.

Mr. Scanlan: I believe that is all.

By Mr. Stephens:

Q. I notice that counsel for Respondent said that you [fol. 268] came pursuant to a subpoena; when was that subpoena served upon you?

A. This morning.

Q. Had you discussed this matter and knew you were coming before the subpoena was served on you?

A. Yes.

Q. And you would have come without the service of the subpoena?

A. I would have come on my own, you mean?

Q. Yes.

A. No.

Q. You wouldn't have come without the service of the subpoena?

A. No.

Mr. Stephens: That is all.

Mr. Blanchard: If it is important, the counsel for Walgreens insisted that I have the subpoena issued before he would allow this gentleman to come. Do you want that on the record?

Mr. Stephens: Yes.

Mr. Blanchard: For the benefit of the Examiner, I instructed Mr. Nagel, counsel for the Walgreen Company two days ago. He stated that he would permit the witness to come and testify only if a subpoena issued. I thereupon wired the Commission immediately and confirmed it by letter, asking that the subpoena be issued, and it was.

Mr. Stephens: That is all I have.

Mr. Blanchard: I have one or two on redirect.

[fol. 269] Redirect examination.

By Mr. Blanchard:

Q. Mr. Scanlan asked you a great many questions, if you ever saw some truck company haul anything to the Walgreen stores. In your job do you very frequently see any truck company hauling anything to any store?

Mr. Scanlan: I object.

By Mr. Blanchard:

Q. Let me ask you to what extent you observed any truck company haul to any store of Walgreen at any time?

A. No, sir.

Q. To any extent?

A. I don't have anything to do with it except for ordering the merchandise.

Q. In connection with a part of your cross examination, you referred to the competition of other drug stores. Do you find it a valuable adjunct to your duties, to the performance of your duties, to keep yourself informed as to what stock other drug stores are carrying in trade?

Mr. Scanlan: I object. He has not been qualified on buying or merchandising; this is on other questions.

Mr. Blanchard: I admit he hasn't been qualified. That is what I am doing.

Mr. Scanlan: I object; it is not proper redirect examination. I didn't go into anything like that on cross examination, and no other counsel did.

[fol. 270] Mr. Blanchard: I don't think you did but in response to one or more questions by whoever was asking about the leaders, he said not only to the grocery stores but to the drug stores. I am asking to find out what he knows about other drug stores, which you opened yourself.

Mr. Scanlan: I didn't ask him any of that line of questions?

Mr. Blanchard: You may not have opened it but the witness answered about other drug stores.

Exam. Sweeney: He was talking about competitors so far as canned goods and grocery items were concerned.

Mr. Scanlan: If he can qualify him to show that he is in charge of any of the merchandising practices or line practices, I have no objection.

Mr. Blanchard: If you let me ask him, I will find out what he knows about it.

By Mr. Blanchard:

Q. Do you find it necessary, in carrying on your job, to keep yourself posted as to what inventories other drug stores, competitors of yours, are carrying in stock?

A. Yes, it is necessary that we know that.

Mr. Stephens: I object; he says it is necessary that we know that. The question is directed to you in your own personal capacity.

The Witness: True.

By Mr. Blanchard:

Q. When you say it is necessary that we know it, to whom do you refer?

[fol. 271] A. To the buyers and the company as a whole.

Q. And do you feel it is necessary that you know it?

A. Definitely. Inventory control is my job.

Q. In other words, it is a part of your job?

A. Yes.

Q. Based on that information how do these stocks in trade carried by your competing drug stores, compare with those carried by Walgreen, so far as diversification is concerned?

Mr. Scanlan: I object; he hasn't shown any knowledge of the stock in trade of other drug stores.

Mr. Blanchard: He said he had to know what other competing drug stores are carrying.

Exam. Sweeney: He didn't say he knew.

By Mr. Blanchard:

Q. Do you know what other competing drug stores are carrying?

A. Yes.

Q. Now, answer the other question.

Mr. Stephens: May I ask as to his qualifications?
Exam. Sweeney: Yes.

Recross examination.

By Mr. Stephens:

Q. What study have you made of the stock in trade or inventories of any drug stores in Wisconsin?

A. I am a graduate pharmacist in Wisconsin.

Q. Of any store other than your own in the state of Wisconsin?

A. Of the stores I have worked in and which I have checked.

[fol. 272] Q. When did you check last, in other stores than you have worked in, in the state of Wisconsin?

A. About a year ago.

Q. Can you tell me what stock in trade is carried by any drug store in Wisconsin other than Walgreens; tell me what stock they carry?

A. Yes, I can, in stores in Racine in Wisconsin, for instance, because when we put up our service stores we went around in the other stores in Wisconsin.

Q. Have you ever been around in other stores in Wisconsin?

A. Yes.

Q. When?

A. Last week.

Q. Don't you largely depend on what somebody else tells you what other stores are carrying?

A. No, we have to make a study of what types of items they are competing against us with and if we can buy and compete with those, we make those recommendations.

Q. Do you make those studies?

A. Myself and my staff.

Q. How much of it do you make yourself? What part do you make yourself, and how much does the staff make?

A. I would say I make the majority of it myself.

Mr. Blanchard: Now, I think the witness may answer the question.

[fol. 273] Repeat the question.

(Question repeated as follows:

By Mr. Blanchard:

"Q. Based on that information, how do these stocks in trade carried by your competing drug stores compare with those carried by Walgreen so far as diversification is concerned?")

A. The same or more diversified.

Redirect examination.

By Mr. Blanchard:

Q. Do a majority or minority of your drug stores have lunch counters?

A. The majority do.

Q. And when you take an inventory of a store do you take an inventory also of the stock in hand that is held to service that lunch counter?

A. Definitely.

Q. Do you sell canned vegetables over the lunch counter, —canned peas, beans?

Mr. Scanlan: I object; let him tell what he sells.

Q. (continued by Mr. Blanchard) Do you sell vegetables of any kind over the lunch counter?

A. Yes.

Mr. Scanlan: Is it in cans or served on a plate?

Mr. Blanchard: If you want to know, ask him. Maybe he handles them on a knife.

A. (continued) They would be served on a plate at the fountain.

[fol. 274] Mr. Scanlan: You don't serve the canned vegetables in the restaurant but on a plate?

The Witness: That is right.

By Mr. Blanchard:

Q. Do you regard the supplies which you have stocked in that store as necessary for the operation of that store as part of your stock in trade? Of your lunch counter?

A. Yes, sir.

Q. And those are kept by you in cans just as Mr. Lillie said, such as you buy in an ordinary drug store only perhaps larger?

Mr. Scanlan: I object to every single question as they are all leading. Mr. Bl-chard, you said you wouldn't ask leading questions.

By Mr. Blanchard:

Q. What kind of packages do these vegetables you sell over your lunch counter come in?
A. All kinds; 2½ cans, No. 5 cans or No. 10 cans.
Q. How do the packages you are testifying to compare with the same type of articles sold in grocery stores, if you know?
A. A lot of articles are the same as bought and sold in grocery stores.
Q. Do you buy the goods in hermetically sealed cans, as you buy them?
A. Yes.

Exam. Sweeney: You are excused; thank you.

(Witness excused.)

Mr. Blanchard: Now, Mr. Nelson, we will put you back on.

[fol. 275] Andrew G. Nelson was recalled and testified further as follows:

Cross examination.

By Mr. Stephens:

Q. Have you a copy of Exhibit 1 before you?
A. Yes.
Q. Have you read Question 7 which states that "he", meaning you, "is an interstate contract carrier of property for the Walgreen coming and for them alone"; did you read that before you signed that statement?
A. I did.
Q. And you signed the statement?
A. Yes.

Q. It was true then, was it?

A. I raised objections to it.

Q. I didn't ask you if you raised objections. I asked you if it was true?

A. At that time, under this contract, it was true.

Q. Was the statement true as a resume of your activities as you signed it?

A. It was not true as to doing business with other people.

Q. You signed the statement knowing it was not true?

A. It was given to me and I signed it.

Q. The question is: You signed the statement knowing it was not true?

A. It is signed; that is right.

[fol. 276] Q. Did you ever make an application in the state of Wisconsin for authority in 1934?

A. Because the law required it.

Q. Did you?

A. Yes, I did.

Q. Now, were you hauling other stuff in the state of Wisconsin for any other person but Walgreen?

A. At that time?

Q. Yes, in 1934?

A. No, sir.

Q. And you hauled and got authority in Wisconsin under I.C.C. 2744, I am showing you a photostatic copy of it, to haul for Walgreen only, did you not?

A. Yes.

Q. And did you then get, in 1935, a further authority in the state of Wisconsin to transport household goods for employes of Walgreen and of merchandise for Walgreen drug stores?

A. Yes.

Q. Why didn't you get any of this other authority then that you claim that you were operating before 1935?

A. Why didn't I what?

Q. Why didn't you get authority from all these other people?

A. The matter was to prove, I had to have one contract, and the Walgreen traffic man went with me.

Q. Who in Wisconsin told you you had to have one con-

[fol. 277] A. I couldn't answer that.

Q. Now, you went and had an application down in the state of Indiana.

Mr. Blanchard: I don't understand there is any intrastate authority. I don't think it is even necessary that the applicant was operating lawfully intrastate at the time the permit was granted. The courts have held it doesn't make any difference.

Mr. Stephens: It is from the grandfather application. That is where this came from.

Mr. Blanchard: By the requirements of the Commission's Order.

Mr. Stephens: I submit this is proper cross examination.

Mr. Blanchard: I object.

Exam. Sweeney: Objection overruled; you may continue.

By Mr. Stephens:

Q. When did you file your grandfather application before the Interstate Commerce Commission? Was it in February, 1935 or February, 1936?

A. You mean the date?

Q. Yes.

A. I couldn't answer that.

Q. It was the 30th day of December, apparently, the application that you swore to, of 1935, is that right?

A. It must be, if I signed it.

Q. Was that the time you were testifying you were so [fol. 278] sure you couldn't afford to hire an attorney to help you with this application?

A. I don't think I testified to that. I testified I didn't have much money.

Q. You testified you didn't have any money to pay any attorney, is that right?

A. Yes.

Q. How was your position six months before that in June, 1935; did you hire an attorney then?

A. I wouldn't know.

Q. You made an application to the Indiana Commission, didn't you, in June, 1935?

A. Yes.

Q. And you had an attorney there by the name of Coleman Patterson, did you not? You hired him, did you not?

A. I can't recall the name.

Q. You hired an attorney to prosecute your application before the Indiana Commission, didn't you?

A. I don't know.

Q. I am reading an extract from that order: "Mr. A. G. Nelson testified he is the sole owner of Andrew G. Nelson Company, that he owns 8 pieces of equipment which he intends to operate over the proposed route, that he has entered into a contract with the Walgreen Drug Company engaged in the drug business", that the hauling you claimed is the hauling of fixtures and supplies only when the [fol. 278A] Walgreen Company opens, closes or remodels one or more of their drug stores in an Indiana city. "Under this operation he would not enter the state more than ten times a year; that his equipment is specially constructed for this type of work; that he would not use more than two pieces of equipment; that he has a contract carrier's permit from Wisconsin and one from Minnesota to do this kind of work."

A. That is true.

Q. Did that correctly reflect your operations at that time?

A. For the Walgreen Company.

Q. Was that your testimony before the Indiana Commission; is that a fair resume of your testimony before it?

A. Yes.

Q. How many pieces of equipment did you have in 1935, the early part, just before the grandfather act went into effect?

A. I wouldn't know exactly; possibly 8 or thereabouts.

Q. And of the 8 pieces of equipment how many were devoted to city cartage or local, and how many in interstate?

A. Two or three in interstate and probably the rest were for city. Some were for coal.

Q. Isn't it a fact that all the list of people that you named this morning in response to Mr. Blanchard's questions were people who were customers of your warehouse business?

A. You mean just strictly the warehouse?

Q. Just strictly the warehouse?

[fol. 279] A. No; we used the warehouse in connection with our trucking operations.

Q. Were there any of the people on the list that you named this morning and you were referring to some memorandum, that weren't customers of your warehouse?

A. Yes.

Q. Can you name me one of them? Refer to your list, and name some who weren't customers of your warehouse.

A. That didn't store goods in the warehouse?

Q. Yes.

A. Half of them wouldn't have goods in the warehouse.

Q. Now, wasn't the list you had and referred to this morning largely a list of your city customers in the city of Chicago and the surrounding territory?

A. I would say the city customers.

Q. And all the names you have testified to on this record were largely for the city customers?

A. Not all of them.

Q. Let me see who weren't.

A. Walgreen Company wasn't; David Slate wasn't. None of the marble companies were. The sugar people weren't.

Q. Why didn't you ask for rights to haul marble in Indiana, then?

A. I wasn't interested in hauling marble at that time.

Q. You got out of the marble business?

A. That is right; they were all broke or out of business.

[fol. 280] Q. How about sugar? Let us take the commodity sugar?

A. It wasn't going so good in 1935 or 1934.

Q. You mean you weren't hauling at all?

A. I wouldn't say not at all. It wasn't going very good.

Q. Did you ever haul any sugar out of Chicago to any of the nine states?

A. To any one of them?

Q. Yes.

A. One.

Q. What state?

A. Indiana.

Q. You never got a permit?

A. You didn't need it when I hauled it.

Q. After June 1st you didn't haul any in Indiana?

A. No.

Q. When was the last shipment of sugar prior to June 1 that you hauled into Indiana?

A. I could hardly say; it might have been about——

Q. Take a look at Exhibit 1 again and the statement in paragraph 8 which reads: "That he (meaning you) hauls to and from Walgreen retail stores located within 600 miles of Chicago; that said transportation has to do with the opening, the remodelling and/or the closing of Walgreen retail stores; the commodities so transported are usually store fixtures, equipment and merchandising for the opening of the store, etc." Did you read that before you signed [fol. 281] the statement?

A. It was true so far as our application was concerned.

Q. Did it represent what you were actually doing for Walgreen at that time?

A. Yes.

Q. The next paragraph of that says: "That the household goods hauled are only for the employes of the Walgreen Company and that payment for said transportation is paid for by the Walgreen Company, and that this movement amounts to practically 10 trips per year". Is that true?

A. Yes.

Q. "That his equipment usually returns empty, except for old store fixtures and equipment and occasionally a transfer of stock for Walgreen Company." Was that true?

A. Yes.

Q. "That he has control over the three units which are used for Walgreen Company and that he believes himself to be a contract operator and not a lessor of equipment." Was that true?

A. Yes.

Q. Have you looked over this statement pretty carefully? Is there anything in this statement which isn't true and correct, which you signed, page 7, which you now say was not true when you signed it?

A. The statement No. 10: "That his operations, except for frequency of service, have been the same for the past [fol. 282] seventeen years", would concern other people besides Walgreen.

Q. So that that statement wasn't true?

A. It probably wasn't.

Q. And you knew it wasn't true when you signed it, is that right?

A. I signed it to get out of there and get out of there as quick as I could.

Q. Why did you want to get out of there; was there anything troubling you?

A. Not a thing.

Q. What was the necessity of your getting out of there as quickly as you could, that you would sign a false statement, knowing it was false?

A. The thing was handed to me and I was agreeable and signed it.

Q. Are you used to signing anything that is handed to you just to be cooperative?

A. Not exactly.

Q. How many times did Mr. Petritz come out to your place in processing your grandfather application?

A. I would say three or four times.

Q. Did he come at your request?

A. I think he did once or twice, and he probably came on his own.

Q. You haven't any independent recollection?

A. I don't have at this time.

Q. It is pretty difficult for you to recollect any of the [fol. 283] things that happened 17 years ago, isn't it?

A. I wouldn't say that.

Q. What particular things stand out in your mind?

Mr. Blanchard: I object; the question goes far beyond anything to do with the issues involved here.

By Mr. Stephens:

Q. Concerning the grandfather application.

Mr. Stephens: I will agree with you, Mr. Blanchard.

Q. (continued by Mr. Stephens) What particular things stand out in your mind?

A. I knew I was like a babe at sea and I was trying to find out; I didn't know what my rights were. Frankly, it was a new law and I just tried to get by the best I could.

Q. But you had had experience in June, 1935 before the Indiana Commission and hired a lawyer, didn't you?

A. Maybe I didn't want to hire another one because I had one.

Q. Are you changing your story, because this morning you said you didn't have the money or it was too expensive?

A. I might have had the money but it was too expens-e; I don't know.

Q. You had been through a hearing in Wisconsin?

A. Yes.

Q. And you knew something about regulation?

A. Not much.

Q. But you had gone through a couple hearings?

A. That is right.

[fol. 284] Mr. Stephens: That is all.

By Mr. Cohn:

Q. The only contract you filed that was in writing?

A. With whom?

Q. The grandfather application was your contract with the Walgreen Company?

A. Yes.

Q. Exhibit 6, which is your Schedule of Minimum Rates, MF.-I.C.C. 1, was issued March 30, 1936. How long did you remain with the company after 1936?

A. With what company?

Q. With the Andrew G. Nelson Company; that is, either as an individual doing business as Andrew G. Nelson or under the corporate name?

A. I severed my connection with Andrew G. Nelson in 1953.

Q. That was after the transfer of the permit to the corporation by the Commission?

A. That is right.

Q. Were you the sole shareholder of the corporation in 1953 when you disassociated yourself?

A. It was not a corporation in 1953.

Q. I mean in 1953; is that when you disassociated yourself?

A. Yes. I owned all of the stock.

Q. And then you sold the stock and then you disassociated yourself, is that right?

[fol. 285] A. Yes.

Q. Now, going back to your grandfather application in Exhibit 1, there is a statement that only three motor vehicles were used in interstate work, in your contract work. That is correct, is it not?

A. Yes.

Q. How many drivers did you employ at the time you filed your grandfather application?

A. With our coal business and everything, we might have had 6, 7, 8, 9 or 10.

Q. How many did you employ with your interstate operations, with your contract work?

A. It would vary but I would say we would have extras for the trucks, probably 4.

Q. Was David Hardy one of the drivers in 1935-1936?

A. No; he was in the warehouse then.

Q. He was a warehouse foreman, was he not?

A. Yes.

Q. And his affidavit is attached to the application?

A. That is right.

Q. And have you reviewed his affidavit?

A. Just at the time when I signed it. He made a statement; it was supposed to be with the papers.

Q. So far as you know, that was a true and correct statement as of that time?

[fol. 286] A. It was.

Q. Now, you had a driver, did you not, by the name of Jacob F. Jacoby?

A. Yes.

Q. He was one of the highway drivers?

A. Yes.

Q. Have you reviewed his statement attached to the grandfather application?

A. Yes.

Q. You would say they are true to the best of your knowledge and belief?

A. Yes.

Q. Is that same thing true of the statements of Robert Stewart?

A. Yes.

Q. Now, during the time that you were connected with the operation of the Respondent or the predecessor company, that you were operating as an individual, did you file any other written contracts with the Interstate Commerce Commission other than that with the Walgreen Company?

A. I can't remember any; I don't have the records.

Q. Did you ever receive any communications from Mr. W. Y. Blanning, director of the Bureau of Motor Carriers, Interstate Commerce Commission, concerning the interpretation of your operating authority?

A. I recall the name and I recall many communications [fol. 287] about various things. I don't particularly recall that.

Q. You don't particularly recall having received a copy of a letter from Blanning, directed to Mr. R. D. Reece, traffic manager of Brach & Sons of Chicago, concerning the interpretation of the words "stock in trade of drug stores"?

A. No.

Q. You have never sought an interpretation from the Commission of the terms or words contained in the permit during the time when you were connected with the respondent?

A. No.

Q. Referring to Exhibit 4, the certificate of registration under the NRA Code, you are familiar with that certificate of registration, are you not?

Q. Yes.

Q. Now, that registration contains within the body of it that this member referring to yourself as an individual, has registered as an anywhere for hire carrier with operations in Chicago, where it designates city or cities; and Illinois, where it designates state or states. Is that a correct statement as of that time that your operations were in the city of Chicago?

A. Our operations were anywhere for hire.

Q. Well, you say with operations in Chicago, Illinois.

A. I didn't write that.

Q. Well, you saw this certificate of registration, did you not, and you submitted it with your grandfather application?

[fol. 288] A. Yes, I saw it, sure.

Q. Do you state that that is not a correct statement contained in there, that your operations are, or were, rather, in Chicago, Illinois, as a city or cities, and the state or states in which operations were conducted?

Mr. Blanchard: I object to the statement; it is obviously misleading. The certificate at no time states it is his only operations and as Mr. Cohn knows, the place of operation had to be the place where the certificate was issued.

Exam. Sweeney: He is reading from the form. How can it be a misstatement?

Mr. Cohn: I am reading from Exhibit 4.

Mr. Blanchard: Well, if you will stick to the certificate, I will not object, but it is a question of what you interpret the certificate to mean.

By Mr. Cohn:

Q. Let me just shorten it. Does Exhibit 4, the certificate of registration indicate the scope of your operations as of the time and date shown therein?

A. As I understood anywhere for hire was any place: I knew nothing about Chicago. I stated anywhere for hire.

Q. If the certificate of registration states that you were operating anywhere for hire in the city of Chicago, Illinois, is that a correct statement of what your operations were as conducted on the date of Exhibit 4?

A. It was not a statement of mine. They gave me that [fol. 289] certificate; I took it, but it was not a correct statement that I only hauled in Chicago or vicinity.

Exam. Sweeney: You didn't have a lawyer representing you when you get the NRA certificate?

The Witness: No, I just went over and I signed it and they mailed it or sent it to me and gave me certificates for my trucks.

By Mr. Cohn:

Q. You attached this certificate to your grandfather application?

A. Yes.

Q. And you made no representation to the Interstate Commerce Commission that the matters contained therein were not true?

A. All they said was that I was in business and I say I was in business.

Q. You relied on it when you submitted it with the grandfather application?

A. I didn't lie about anything.

Q. You relied upon it?

A. Yes.

Q. In order to get your certificate of registration from the NRA, didn't you have to file a written application requesting the certificate?

A. I couldn't remember. All I know is I went to the office and they sat down and talked to me, and they either mailed it to me or I came out with it.

[fol. 290] Q. It is a certificate based upon the information you gave to the NRA in order to get it, not a trucking industry official?

A. Yes, whoever was there.

Mr. Cohn: That is all.

By Mr. Scanlan:

Q. As I understand the operations, you operated as an individual up until some time in 1951, is that correct?

A. That is correct.

Q. And at that time you formed a corporation?

A. That is right.

Q. Now, who else was associated with you in the corporation at that time?

A. In what way?

Q. In 1951? Did you take on any new employes in 1951?

A. Yes, I did.

Q. What was the name of those employes?

A. The only one was Jess Hart.

Q. And in 1951 Jess Hart began solicitation of certain accounts, did he not?

A. Yes.

Q. Going back from 1936 to 1951, did you file a schedule of minimum rates and charges with the Commission on various occasions?

A. Not on various occasions. I don't recall any man was in that year. They didn't ask me for it; they may have. I don't recall.

Q. In the period from 1936 to 1951, which was a 15-year [fol. 291] period, approximately, did you ever file with the Interstate Commerce Commission any contract involving a movement of freight in interstate commerce, with any shipper other than Walgreen?

A. I can't recall that.

Q. Do you recall of any contract other than the Walgreen, that was ever signed?

Mr Blanchard: I object to the question. It implies that more than one contract was signed with Walgreen. The witness has not so stated.

Mr. Scanlan: There is no such implication.

Mr. Blanchard: It may not be so intended.

By Mr. Scanlan:

Q. Do you understand the question?

A. I don't now.

Q. Did you file any contract with the Interstate Commerce Commission, with any shipper other than Walgreens, during the period from 1936 to 1951?

A. I can't recall if I did or not: I don't know.

Q. Wouldn't it be safe to say, Mr. Nelson, that you did not sign any contract for any other shipper other than Walgreen, in that 15-year period?

A. It may: I don't know.

Q. It may be that that is a correct statement?

Mr. Diehl: He says he does not know. I object to repetitious questions.

Mr. Scanlan: I object to Mr. Diehl attempting to wood- [fol. 292] shed the witness.

Exam. Sweeney: He may answer the question.

By Mr. Scanlan:

Q. Did you at any time in the 15-year period from 1936 to 1951 write any letter to the Interstate Commerce Commission or to any representative of the Bureau of Motor Carriers advising them that the permit that had been issued to you did not correctly reflect the authority that you should have had?

A. Did I write to them?

Q. Yes.

A. I don't recall if I did. I wrote to the Commission for suspension of operations during the war.

Q. And that is all, is it not?

A. I can't recall the other.

Q. Do you have any recollection, then, of ever writing to any one with the Commission or the Bureau of Motor Carriers telling them they did not give you the proper type of operating authority?

A. No, I don't think I ever did.

Q. Now, in 1951 you formed this corporation and Jess Hart began working for you, is that right?

A. Yes.

Q. Did he have any financial interest in the company?

A. In the company?

Q. Yes.

[fol. 293] A. No.

Q. Jess Hart owned a fleet of trucks and those were put to work for your company, were they not?

A. That is right.

Q. And you were paying Jess Hart—in other words, Jess Hart was paying you a certain percent——

Mr. Blanchard: May I inquire what the events and occurrences in 1951 have to do with the meaning of this certificate?

Mr. Scanlan: I am going to tie it up.

Mr. Blanchard: I object. I don't want to pay for it. I don't want to pay for the record——

Mr. Scanlan: You certainly put a lot of things in here which were completely immaterial.

Mr. Blanchard: I didn't put anything in which didn't have to do with the time when this permit was issued.

By Mr. Scanlan:

Q. In the operations of Jess Hart at this time——

Mr. Blanchard: Objection.

Exam. Sweeney: Objection overruled.

By Mr. Scanlan:

Q. He agreed to pay you a certain amount for the use of your permits, is that right?

A. Yes.

Q. And he took his trucks and conducted those operations?

A. Yes.

Q. And that is the first time any contract was entered into by you as an individual or by you as a controlling [fol. 294] member of Andrew G. Nelson, Inc., is that correct?

A. I wouldn't know whether it was the first time; that is when we got after it.

Q. When did you sell out your business to the present owners of Andrew G. Nelson Company?

A. About April, 1953, I believe; somewhere in there.

Q. Would you please refer to the document that has been identified as Exhibit 3, and tell us whether or not the vast majority of the list of shippers shown on Exhibit 3 were entered into by the new owners of the Andrew G. Nelson Company?

A. I wouldn't know.

Q. Would you please refer here to the date of the contract, and tell me if that isn't true?

Exam. Sweeney: The exhibit speaks for itself pretty well on that, doesn't it?

Mr. Scanlan: Yes, but his memory was a little hazy and I felt we would refresh it a little bit.

A. I remember the Muir Company.

By Mr. Scanlan:

Q. That was in 1952, wasn't it?

A. Yes; that is right.

Q. Isn't it a fact that practically all of those contracts were entered into by the new owners of the company?

A. No. I don't know anything about it.

Q. In your testimony you listed the names of a number of the companies with whom you had done business. Now, [fol. 295] isn't it a fact that one of the companies was Neisner Brothers?

A. That is right.

Q. And you stopped doing business with them approximately in 1933 or 1934?

A. No, I would say probably 1932 to 1934 or 1935.

Q. In your direct testimony you said you dropped the account in 1932 and you stopped in 1934, is that correct?

A. Something like that, yes.

Q. When did you stop hauling for Martin Marble, 1932 or 1933?

A. I would say in the early 30's or late 29's.

Q. Isn't that also true as to the Puritan Marble, Acme Marble, and Henry Marble Company?

A. Yes.

Q. The Davis Slate and Manufacturing Company, as I understand it, you held that account until approximately 1940?

A. In there; they went out of business; yes.

Q. That consisted in the movement of products in Chicago as a local carrier?

A. Largely, toward the latter part.

Q. And that was a local operation?

A. Yes.

Q. Now, you named a shipper of Loyal Electric?

A. Yes.

Q. When did you stop hauling for that company?

A. I would say about the same time.

[fol. 296] They moved out of the neighborhood.

Q. That was a local operation in Chicago?

A. Along that time it would be.

Q. And how about Grossman?

A. Grossman went out of business about—he owed me a lot of money; I don't know when.

Q. It was in the early 30's, 1930 or 1931?

A. I would say that, yes.

Q. Now, how about M. J. Sanborn?

A. They went out in the late 28's or 29's.

Q. And that same thing is true of Federated Drugs and Buyright Company?

A. Federated were taken over by Walgreen. Buyright didn't last more than a couple of years, or in that neighborhood of time.

Q. 1929 and 30's?

Mr. Stephens: May I be excused? I have to leave to catch a plane?

Examr. Sweeney: Yes, sir.

By Mr. Scanlan:

Q. Graf went out of business in 1931?

A. I wouldn't know the exact time.

Q. Approximately that time?

A. Yes.

Q. How about A. C. Drury Chemical Company?

A. They are still in business.

Q. And the hauling that you did for them was a local operation?

[fol. 297] A. There was some interstate. Their business is local now.

Q. When was the last time you hauled anything in interstate commerce for them?

A. Drury?

Q. Yes; A. C. Drury?

A. I can't remember that.

Q. That was 20 years ago or 25?

A. I can't remember that.

Q. In that general area?

A. I couldn't say because I might have gone down in Indiana for something; I don't know.

Q. Your hauling for Hendrickson Motors was a local operation?

A. Yes.

Q. Godchaux Sugar Company went out of business in 1929 or 1930?

A. I would say after 1932.

Q. How about the Freeman Paper Company?

A. I think we lost them in 1936 or 1937.

Q. That was a local operation was it not?

A. After the law was passed, it more or less became local.

Q. Yes, so that your operations for them were local in the city of Chicago?

Mr. Blanchard: What law?

The Witness: The permits.

Mr. Blanchard: The motor carrier application?

The Witness: Yes.

[fol. 298] By Mr. Scanlan:

Q. When did you first haul for Armour Fertilizer Company?

A. I would say along in 1927, 1928, maybe 1925.

Q. When did you stop hauling for Armour?

A. After we hauled for them about three seasons, it smelled up the place and we had to quite. My wife wouldn't live with me.

Q. After hauling some of that in the latter part of the 20's, is that right?

A. Yes.

Q. And that was a local operation in Chicago?

A. No, we picked it up at Chicago Heights and took it anywhere they wanted it. It might be to a country club in Indiana or it might be at Kenosha.

Q. Getting back to Goetz Brewing Company, you didn't haul anything for Goetz after 1932 when prohibition was repealed?

A. No.

Q. Now the Stone Brick Company, when did you stop hauling for them?

A. In 1928, I would say.

Q. How about Robinson Waste Paper Company?

A. I think that lasted to 1932 or 1933.

Q. And Mosler Safe Company?

A. We might have moved some stuff locally, later in the late 30's but it all stopped in there during this depression thing.

Q. Most of it fell by the wayside in 1932 and 1933?

[fol. 299] A. Yes.

Q. How about—did I ask you about Mosler Safe Company?

A. Yes.

Q. How about Long Plumbing?

A. I still have that account.

Q. That is still a local operation?

A. It is now.

Q. When is the last time you ever hauled anything outside of the Chicago area?

A. For Long?

Q. Yes.

A. Not after I got my permit.

Q. You haven't hauled anything for them outside the Chicago area for, say, five years prior to the passage of the Motor Carrier Act?

A. Yes, continually for Long.

Q. But you didn't haul anything for them since the passage of the Motor Carrier Act?

A. Not interest; but local, yes.

Q. How about this Gebhard Chili Company?

A. That went about the same time, in 1933 or 1934 or 1935.

Q. And that terminated your operation with the chili company?

A. Yes.

Q. A. E. Childs?

A. That is the same story, witch hazel; that went about [fol. 300] the same time.

Q. Phillips Brothers?

A. Same thing.

Q. They went in 1932 or 1933?

A. Yes.

Q. Busse Service?

A. They went out in 1932 or 1933.

Q. When did you stop hauling for Renault, 1932, after prohibition was repealed?

A. Yes.

~~Q. You stopped hauling after prohibition was repealed?~~

A. Yes.

Q. So that would be in 1932, in there?

A. Yes.

Q. How about Packer Sugar and Franklin Sugar,—1932 or 1933?

A. Yes.

Q. Myles Salt Co.?

A. Yes; I don't know whether they fell by the wayside. They quit doing business with us.

Q. How about Seiberling Paper Company?

A. About the same time.

Q. Judge and Dolph; when did you haul for them last?

A. I would say when they were formed; I imagine they were formed somewhere in 1934 and it continued up until maybe the 40's.

Q. And you hauled locally in Chicago for them, did you not?

[fol. 301] A. Yes.

Q. K. Klein; that was a department store at 12th and Halsted.

A. Yes, they have been out about 14 years.

Q. And any operations you did for them was locally in Chicago?

A. Well, in their operation we may cross state lines with furniture that somebody would buy. I don't recall.

Q. Generally speaking, the trade area from Klein might go to Gary and other places, but most of it was purely local?

A. I would say so.

Q. Now, Mr. Nelson, in the statements you made to the regulatory bodies in Indiana, Wisconsin, and Minnesota, which were made on or before July 1, 1935 you made the representation to all of those bodies that the only operation that you had in interstate commerce was under a contract which you had with Walgreens, isn't that right?

A. The Walgreen men were with me when we made that application.

Q. Please just answer the question: Isn't it a fact that you made those representations to all of those state regulatory bodies on or before July 1, 1935?

A. Yes.

Mr. Cohn: I think that is all. Thank you very much, Mr. Nelson.

Mr. Lillie: I think that counsel for the interveners have covered this thoroughly enough, so that I won't have to ask any further questions.

[fol. 302] Exam. Sweeney: I would like to ask you, in constructing your testimony which appears in signing this statement which appears as Exhibit 1, would I be correct in assuming that the first time you saw it was when it was shown to you in the office of Supervisor Petritz?

The Witness: That is true. It was read to me and shown to me, and I was told to sign it, and I signed it.

Exam. Sweeney: You knew nothing about the things that were in it before that time, is that right?

The Witness: No; I never saw it before.

Exam. Sweeney: Do you have a copy of it before you there?

The Witness: Yes.

Exam. Sweeney: Look at paragraph numbered 9. It says that you submitted the following to Supervisor Petritz for inspection as proof of operations. Do you see that?

The Witness: That is right.

Exam. Sweeney: And then go down to sub-paragraph 6. Now, you furnished him prior to the preparation of this statement, according to the sub-paragraph 6, an assortment of delivery receipts, dated from June date of June 27, 1934 to September 21, 1935, showing interstate contract movements for Walgreen Company. Now, if you didn't want it confined, if this was such a surprise to you, how was it you didn't show them other delivery receipts showing all your other operations?

The Witness: They told me what I should do; that I had [fol. 303] to get a contract. They asked for these tickets; they had them there. They called me down and they had this.

Exam. Sweeney: This wasn't a surprise to you at the time you were called down there?

The Witness: I never saw it before but I got all these things ready for the application.

Exam. Sweeney: You must have known it was only going to apply for Walgreen because those were the only delivery receipts.

The Witness: Yes, I knew our application for contract carrier was to apply to Walgreen because I was doing this and I could add to my contracts after I established it. I was told I needed one contract, one delivery in each state; it didn't make any difference where it was, and that is what I submitted.

Exam. Sweeney: When you say you could add to your contracts, you mean you could add other contracts than Walgreen's?

The Witness: With anybody; showing the kind of business I had been doing. It didn't say anything about drug stores.

Exam. Sweeney: Just what business were you doing November 11, 1936?

The Witness: I was in the general coal business, the warehouse business; the cartage business.

Exam. Sweeney: Local cartage?

The Witness: I was delivery for Walgreen itself on the interstate stuff.

Exam. Sweeney: Outside of Walgreen at that particular [fol. 304] time, you weren't engaged——

The Witness: At the time this was, that was primarily Walgreen.

Exam. Sweeney: No further questions.

By Mr. Cohn:

Q. A question was suggested by the Examiner in his interrogation; the delivery receipts which are referred to in Exhibit 1 and in paragraph 9 (6) to paragraph (9), are those that are listed in your grandfather application under the heading: The following original signed tickets are hereby submitted and then there is a list of some 17 tickets; those are the tickets referred to, are they not?

A. Yes, delivery tickets we gave to them.

Exam. Sweeney: Could you have submitted any other delivery tickets covering that particular period for interstate movement?

~~The Witness: Yes, previous to the Act, yes.~~

Exam. Sweeney: I say, during the time covered by the delivery receipts you did submit?

The Witness: They were all there; I could have given them any number they wanted.

Exam. Sweeney: Just a moment. Between the date of June 27, 1934 and September 21, 1935, that covers a period for the delivery receipts which you did submit. Now, in that same period could you have furnished any delivery receipts dated within that period for transportation in interstate commerce for transportation for anyone other than Walgreen?

[fol. 305] The Witness: I couldn't answer that now. I don't know. I think I could have. That is a short period of time there. That is only a couple of months. I am not sure what happened in a couple of months.

Mr. Cohn: It is over a year.

Mr. Blanchard: It is over a year.

The Witness: When tied to a year, I couldn't tell definitely.

Exam. Sweeney: Do you have any redirect?

Mr. Blanchard: Yes.

Redirect examination.

By Mr. Blanchard:

Q. Mr. Nelson, you were asked about all the showings you made before the Wisconsin Commission, and was all that matter submitted to the Commission when you filed your application for a permit?

A. That is right.

Q. Everything that you were asked about, the statement which you signed; was that all submitted to the Commission?

A. That is right.

Q. And in connection with that submission, did the officials of the Commission, including Mr. Petritz, have full access to your shipping tickets, your sales accounts, etc.?

A. They had access to anything I had at the office.

Q. And as a result of that entire investigation and process, you were issued a permit?

A. That is right.

[fol. 306] Mr. Blanchard: Now, I don't think I offered the permit itself in evidence.

Exam. Sweeney: We still have Exhibits 4, 5 and 6 that have not been offered in evidence.

Mr. Blanchard: I ask this be identified as Exhibit 7.

Exam. Sweeney: Exhibit 7 for identification.

(The document referred to was marked Respondent's Exhibit 7, Counsel Blanchard, for identification.)

Mr. Scanlan: I object; there is nothing that was gone into on cross examination that would allow it.

Mr. Blanchard: I am going to offer half a dozen documents as Counsel's exhibits: I am offering this as Counsel's Exhibit 7.

Exam. Sweeney: It is just a matter of convenience, to have.

Mr. Lillie: I think it is proper to have it.

By Mr. Blanchard:

Q. Now, could you check any of the dates, etc. that you gave Mr. Scanlan from your books of account, showing when those people paid you money for hauling, even though you haven't got the tickets?

A. That is right.

Q. The dates you gave him as to what you were doing and the nature of service was just your memory?

A. Memory, yes.

Q. Of occurrences back in 1934, 1935 and 1933?

A. Things I was doing.

[fol. 307] Mr. Blanchard: Mr. Examiner, we will try to work some way to get Mr. Nelson back because I have some more questions, but we will be prepared to go ahead in the morning with at least one witness, and then, of course, we have the I. & S. case. We might finish that by noon and then go back and finish this case afterwards.

Mr. Scanlan: I can't come back tomorrow afternoon. If there are any other questions that Mr. Blanchard would want, couldn't he ask them now and get them over with?

Exam. Sweeney: We will recess until 9:30 tomorrow morning.

(Thereupon, at 5 o'clock p.m., Thursday, May 20, 1954, the hearing in the above-entitled matter was adjourned to Friday, May 21, 1954, at 9:30 o'clock a.m.)

[fol. 311] STENOGRAPHER'S MINUTES OF MAY 21, 1954

Proceedings

Exam. Sweeney: The hearing will come to order.

ANDREW G. NELSON resumed the stand and testified further as follows:

Redirect examination (continued):

By Mr. Blanchard:

Q. Certain references were made with reference to participations in state commissions, both in Indiana and Wisconsin, and I believe I asked you whether all the information brought in here yesterday wasn't present at the time the permit was granted. Will you state how those proceedings before those Commissions were instigated?

A. Of course, when we had trucks the states stopped us and told us we had to have a permit and then Walgreen was immediately interested in it and they saw the traffic I was doing, and their legal and traffic department got it for me; the traffic manager appeared with me before the Commission.

Q. Did you retain or employ the lawyer who was represented there?

A. No, I never did; if he was employed he was employed by Walgreen. I just went with the traffic manager and testified.

Q. I believe you told me yesterday when I pointed out your Blue Eagle certificate, showing you were having only five trucks. That was about at the time this business was at a low, following the depression?

A. Yes; we were on the up then.

Q. Did you go on and improve from that time on and [fol. 312] have more trucks either by purchase or lease, as your business continued to grow?

A. All by purchase; very little by lease.

Q. That is after 1935-1936?

A. Yes.

Q. Did you, in referring to the customers which you had, attempt to describe all the customers you had or was it those you could recall, having no records available?

A. Just what I could recall.

Mr. Blanchard: That is all of Mr. Nelson.

Recross examination:

By Mr. Lillie:

Q. Mr. Nelson, when you sold out your stock in the Andrew G. Nelson Inc., did you discontinue then all motor carrier operations, or did you continue with some motor carrier operations?

A. I continued my local and Illinois operations.

Q. That is, you operate what is known as a local cartage business, is that right?

A. No, I have permits as a specialized carrier, a contract carriers, and a local carrier; three permits for the state of Illinois.

Q. That is, within a 50-mile radius of Chicago?

A. No; the state of Illinois grants these permits and I have three of them.

Q. What I have reference to is usually they give you 50 [fol. 313] miles from origin points?

A. No, I am a member of some traffic bureau, household goods or something, that files tariffs for the entire state.

Q. And for some time prior to your sale of the stock in the Andrew G. Nelson Inc. you were not active, were you, in the operations under your permit MC-1194?

A. You mean before I incorporated?

Q. Yes.

A. I started to. I bought some new equipment there and I was making things and then I incorporated. The Commission notified me to start operations somewhere after the war, 1946 or 1947, and then our equipment began to get pretty old and it was hard to get new equipment and I finally bought some new tractors and tailers and a couple new trucks, and started out beginning to pick up these ends after being suspended during the war, and I found things different from when I went out.

Q. So the physical operations, as I understand it, were conducted by what is his name, now?

A. You mean after they incorporated?

Q. Yes.

A. Jess Hart; my health was failing.

Q. The equipment that was used was his or your equipment?

A. His equipment.

Q. What happened to your equipment?

A. I still have it.

[fol. 314] Q. What was that used for during that period?

A. I had only a dump truck to put on the tractor, and converted to haul large loads of coal.

Q. Did you have any line-haul equipment of your own during that period?

A. Yes; I still have it, but I wasn't using it.

Q. Weren't you using it in local cartage operations in servicing some of these companies you had serviced in the past?

A. Locally, yes. Of course; the units have been changed from what they were before. I had to shorten them up.

Q. What I am getting at is: Was there any material difference in your income from motor carrier operations before or after you sold your permit in this case?

A. There was some difference, yes.

Q. But you still retained the equipment you had when you were operating under this permit and utilized it for other transportation?

A. Yes; other things.

Mr. Lillie: You may inquire.

By Mr. Cohn:

Q. Mr. Nelson, the fact is with respect to the equipment you operated on July 1, 1935, that your statement that is identified as Exhibit 1, which is a part of your statement made to the Interstate Commerce Commission as a part of your grandfather application with respect to your equipment, is true and correct as of that date?

[fol. 315] A. Yes.

Q. You stated at that time you owned and operated 8 trucks on July 1, 1935?

A. That would be about right.

Q. And that only 3 units, however, are used in contract interstate work. The balance of the equipment is used as follows: two dump trucks are used in applicant's coal business, and two other trucks are used in applicant's cartage business. That was a correct statement at that time?

A. I think it was, yes.

Q. Now, you continued, you say, in the local cartage business in Illinois?

A. Yes.

Q. And you are presently so engaged?

A. Yes.

Q. I presume you retained the local cartage business after you sold your stock in the Andrew G. Nelson corporation?

A. Yes, I did. It is not incorporated; my local business is not incorporated.

Q. Your local business is operated under what name?

A. Nelson Warehouse & Express Company, Andrew G. Nelson, doing business as.

Q. Which was the original name of the respondent before it was incorporated?

A. Yes.

[fol. 316] By Mr. Crouch:

Q. Isn't it a fact you are doing about the same business today as prior to the time that you sold Andrew G. Nelson Inc. and have been doing since 1935?

A. You mean locally?

Q. In general?

A. I do a considerable greater coal business. I became quite extensive in that. My warehouse is about the same and I would say local cartage is pretty much the same but it might have sloughed off a little bit.

Q. I mean your customers are about the same today as they were in 1950 and for your general line of business, that you are not doing any less than what you were doing in that time, even though you sold out to Andrew G. Nelson Inc.?

Mr. Diehl: I wish to object to the question unless it is clarified. I don't think the witness understands. I think counsel wants to know whether he is doing any interstate business now, whether he was doing interstate business at the time it was sold, and I think he ought to question him in that fashion to be fair to the witness.

The question as framed is not quite fair because it leads this witness to suspect, I believe, that what he wants to ask him about is the exempt business so far as interstate is concerned, and if I interpret the question correctly, that is not the question he is asking. He wants to know if Mr. Nelson is doing or he was doing in 1935, at which time he [fol. 317] held a permit and was doing an interstate business.

Mr. Blanchard: I understood the question to be limited to the local business done now as compared to the local business done in 1950.

Exam. Sweeney: Are you confused?

The Witness: Definitely.

Exam. Sweeney: I don't doubt you are.

Would you care to ask him a new question?

By Mr. Crouch:

Q. The question I want to know is if you are not doing exactly the same business today that you were doing prior to the time you incorporated Andrew G. Nelson Inc. confining all the business you did at one time in 1950, you had it all under one name?

A. That is right. We were attempting to interest business at that time.

Q. And you still have Walgreen as a customer today?

A. I do; it is not as large as it was.

Q. Then you are doing practically the same business today, even though you sold Andrew G. Nelson Inc., as you were in 1950, is that correct?

A. I wouldn't know. I don't think that is correct.

Q. What were you doing in 1950 that you are not doing today?

A. In 1950?

Q. Yes.

A. I was operating interstate that I am not doing today.

[fol. 318] Exam. Sweeney: For whom?

The Witness: For anybody I could get a contract with.

By Mr. Crouch:

Q. Did you have any contracts at that time in 1950?

A. I can't recall definitely. I started back after I got my permits from the Commission. My health failed. I didn't get around so well, and I attempted to use my equipment.

Q. Do you remember whether you had any contracts other than with Walgreen prior to the time you incorporated?

A. I don't remember.

Mr. Crouch: That is all.

Redirect examination (continued):

By Mr. Blanchard:

Q. As I understand, Mr. Nelson, your career, you had two severe set-backs, the depression and the war during ~~which~~ the Commisson authorized you to suspend operations, is that right?

A. Yes, I did. I think I had three. I had one in 1921 or 1922, too.

Q. On each occasion you started to ~~build~~ back until your next interruption; is that a summary of your picture?

A. Yes; that is a summary.

Exam. Sweeney: Off the record.

(Discussion off the record.)

Exam. Sweeney: On the record.

Mr. Blanchard: May we have a short recess?

[fol. 319] Exam. Sweeney: Yes.

(Short recess.)

Exam. Sweeney: On the record.

By Mr. Blanchard:

Q. Mr. Nelson, reference was made by Mr. Crouch to the time that the interstate end of your business was operated by one Jess Hart. What time was that?

A. That was in the early part of 1951, I would say, about March.

Q. And was your participation in and knowledge of the interstate business from that time on as great as it had been up to that time?

A. From that time on it was much greater.

Q. To your personal knowledge?

A. Well, I had all the records at the office and the drivers' logs and delivery tickets.

Q. How about the actual operation and service?

A. I didn't have that at our place at all; I didn't see that.

Mr. Blanchard: That is all.

Recross examination (continued).

By Mr. Scanlan:

Q. Right along that line, one question: The actual operations were being conducted by Jess Hart?

A. That is right.

Q. And it was with his equipment?

A. That is right.

Q. And that equipment was not kept at your place of business but in the garage of Jess Hart?

[fol. 320] A. That is right.

Q. You had nothing to do with it at all, and he gave you a fixed percentage of the revenues for using your permits?

A. No, that isn't true. I had everything to do with it; I was his boss.

Q. So far as the actual operation is concerned, he took care of all that?

A. He did the actual physical work of getting the contracts. I signed some of them. The records were kept at our office. That was the head office, at Harvey.

Q. He handled all the despatching?

A. Yes.

Q. And the despatching was done with his trucks and drivers?

A. Yes.

Q. And he gave you some fixed percent, some 5 percent, for using your permits?

A. I don't know; it was a percentage of the entire gross receipts.

Q. He gave you a fixed percentage of gross revenue?

A. Yes.

Q. What was it?

A. I couldn't say.

Q. Was it 5 percent?

Mr. Diehl: I submit it is irrelevant and immaterial as to what the percent was.

[fol. 321] Mr. Scanlan: I think it is material and tends to show the type of operation and just who was conducting it.

Mr. Blanchard: Where is that in this investigation in 1952 just prior to the sale?

Mr. Scanlan: You are the one that went into it.

Mr. Blanchard: Mr. Crouch went into it.

Mr. Scanlan: Then you started questioning him.

Exam. Sweeney: Objection overruled. Would you answer the question?

By Mr. Scanlan:

Q. What was the percentage that Jess Hart paid you for using your permits?

A. You mean what I received or what I was supposed to receive?

Q. I guess there is a difference because you didn't get everything you were supposed but what were you supposed to get?

A. I was supposed to get 5 percent of the gross but I was supposed not to get anything until the business got going. I was attempting to build up this business again. It was simply an effort on my part not being able to do it myself, to get somebody else to do it. I did buy equipment but I couldn't get around to use it.

Q. Did Jess Hart die?

A. No.

Q. His equipment was repossessed and he lost his equipment?

A. I don't know that. I haven't seen Jess Hart since he disposed of the stock. I have had nothing to do with him.

[fol. 322] Mr. Scanlan: That is all.

By Mr. Crouch:

Q. Jess Hart worked for you, then?

A. Yes; I would say he was an employe.

Q. Was he on the payroll?

A. If he made any money.

Q. You do have a payroll?

A. And what a payroll.

Q. You pay a man with a check if he works for you?

A. Yes.

Q. You never paid him in any other way?

A. No; he was responsible to me.

Q. For nothing; he didn't get paid for it?

A. You make lots of deals that don't turn out when you go out in business. A lot of them don't turn out.

Q. You actually didn't pay him anything?

A. Out of my pocket?

Q. Out of the business?

A. I don't think we have any proof that we paid him.

Q. That would be the way you paid him; would be by check?

A. I don't know.

Q. You didn't pay him?

A. I don't know whether we did or not.

By Mr. Cohn:

Q. Where did Jess Hart maintain his business that was in Harvey?

A. In Harvey.

[fol. 323] Q. He was in the business of leasing his motor equipment to carriers, generally; not only yours?

A. I am not familiar with that at all.

Q. He maintained all the equipment, did he not?

A. He maintained all the equipment.

Q. And he despatched the equipment?
A. That is right.

Mr. Cohn: That is all.
Mr. Blanchard: That is all.
Exam. Sweeney: You are excused.

(Witness excused.)

Mr. Blanchard: I will call Mr. Peters.

ALBERT C. PETERS was sworn and testified as follows:

Direct examination.

By Mr. Blanchard:

Q. Please state your full name.
A. Albert C. Peters.
Q. Where do you reside?
A. 403 North Belmont Avenue, Arlington Heights, Illinois.
Q. What connection, if any, have you with the Respondent carrier here?
A. I am one of the officers of the Respondent carrier, the secretary-treasurer.
Q. Are you a substantial or rather minor stockholder?
A. I am a stockholder in the corporation.
[fol. 324] Q. What I mean is, do you have just shares enough to qualify for office, or do you have a substantial interest there?
A. I have a substantial stock interest in the carrier.
Q. How long have you held that interest?
A. Since April 1, 1953.
Q. That is the time that the transfer to the present corporation was made by Andrew G. Nelson Warehouse & Express Company?
A. That is the time when I acquired the stock interest in the respondent corporation.
Q. What was your prior experience in or in connection with the trucking industry? Go back to the first time that industry entered your vision and tell us what you did.

A. I was employed by the Interstate Commerce Commission with the Bureau of Motor Carriers, and I started my employment with them approximately May 1, 1939, and I was with the Commission continuously until about September 1, 1949.

Q. Was it all the time with the Bureau of Motor Carriers?

A. Yes, during that entire period of time.

Q. And with what office were you connected?

A. With the Bureau of Motor Carriers, stationed in their Chicago office.

Q. And that was during the entire period?

A. Yes, sir.

Q. In what capacities were you engaged in that office, starting out, and if you had any changes, tell us about them?

[fol. 325] A. I started originally as a special agent and I was special agent for approximately 4 years, and then I became a district supervisor, and I remained a district supervisor for approximately 4 years. Thereafter, I was attorney and I remained as attorney until I resigned about September 1, 1949.

Q. And during this 10-year period did your regular work involve consideration of the grants found in common carrier certificates and contract carrier permits and their interpretation?

A: Among various other duties, yes.

Q. And at any time during that period of your employment do you recall any question ever arising as to the meaning of the permit which you now hold in the office of the Commission?

A. To the best of my recollection, during the time I was with the Interstate Commerce Commission, I have no recollection that at any time was the meaning of the terminology contained in that permit ever raised or questioned by anyone.

Q. When did your negotiations commence for the purchase of the stock of the respondent corporation?

A. Approximately a year prior to the actual consumption of the stock purchase.

Q. And at that time or during the year following, did you inspect the permit, the rights under which you were proposing to purchase?

A. I did.

Q. Who was associated with you, if anyone, in connection with that acquisition?

[fol. 326] A. Mr. Harold E. Nelson.

Q. And he is the one who has been referred to here as the president of the corporation?

A. He is.

Q. That permit, I think, is of record and it shows that it also covers the right to haul new and used household goods?

A. It does.

Q. In connection with your official duties, were you aware of any specific definition which the Commission had made of that term, and of what articles it included?

A. I was. I was familiar with the fact that a determination had been made by the Commission and a definition had been made by the Commission of the terms household goods in proceedings entitled 17-MC-467, I believe.

Q. And had that definition, to your knowledge, ever been reduced to tariff form by any carrier or carriers? I mean had it been published in any tariff which had been filed with the Commission?

A. Yes; to my knowledge there were numerous carriers who participated in tariff publications which set forth the definition and the meaning of the term household goods.

Q. And have you caused to be prepared a photostatic copy of that tariff provision to which you have just referred?

A. I have.

[fol. 327] Mr. Blanchard: I ask to have this document marked Exhibit 8 for identification.

Exam. Sweeney: It will be marked Exhibit 8.

(The document referred to was marked Respondent's Exhibit 8, Witness Peters, for identification.)

By Mr. Blanchard:

Q. Is this a true and correct copy of the page identified in the caption of that exhibit, Exhibit 8?

A. It is.

Q. Before you consummated the purchase of the stock of the respondent corporation, did you reach or form an opinion as to the extent of the rights granted by that permit based upon your 10 years' experience in the motor carrier industry?

A. I did, and here is what I did in forming that opinion. I took it upon myself to call at the office of the Bureau of Motor Carriers here in Chicago, to inquire what the operating authority was that was presently in existence with respect to Andrew G. Nelson, first doing business as Nelson Warehouse and Express Company, and subsequently what the operating authority was with respect to the operating authority held by the corporation Andrew G. Nelson Inc., and I determined that a permit had been issued first to the individual, subsequently to the corporation, and that the permit or permits were still outstanding and in good force and effect; that no proceedings had ever been instituted leading to a possible revocation of these operating authorities and that they were valid and outstanding permits.

[fol. 328] Q. And I believe the compliance order upon which the permit is based is shown by this record to have been issued in 1938?

A. That is correct. The compliance order had been issued and also set forth the scope of operating authority that the carrier was privileged to acquire.

Q. You did then reach an opinion as to what rights were conferred to the holder of this permit?

A. I did.

Q. Did you or did you not communicate that to Mr. Nelson, that opinion, with whom you were associated?

A. I did.

Q. And will you tell us what that opinion was that you reached as to the commodities which you were authorized to haul, and the territories within which you might haul them?

A. The opinion that I reached was that the outstanding permit authorized the transportation of new and used store fixtures, new and used household goods, and stock in trade of drug stores between points and places in the ten enumerated states contained in that permit.

I informed Mr. Nelson that it was my opinion that the term stock in trade of drug stores not having any keystone restriction contained in the permit, would authorize the holder to engage in the transportation of any commodities which were carried by drug stores and which were offered [fol. 329] for sale to the general public, or any other things which drug stores carried in their stores which they needed in the conduct of their business as a drug store.

I informed Mr. Nelson that in my opinion, since the permit did not contain any keystone restriction, that those commodities which drug stores had and offered for sale to the general public did not have to be transported to drug stores nor from drug stores, nor did they have to be earmarked as eventually reaching drug stores; that had the Commission wanted to specifically limit the carrier to the transportation of those commodities to drug stores, they would have done so by specific language in the permit, as they had done in many other permits which contained keystone restrictions.

Q. I think we all understand what you mean by keystone restrictions but somebody might read this record some time, to whom that term might be a little obscure. Will you explain what we practitioners mean when we speak of a keystone restriction?

A. My understanding of a keystone restriction is certain terminology which the Commission places in a permit which authorizes a carrier to transport certain named commodities provided that the transportation is under contracts with a particular class of shipper or shippers.

Q. I have before me a decision as yet unreported but enroute to the printer, of the statutory court for the Eastern District of Wisconsin wherein the permit considered was: [fol. 330] Household goods; the carrier was authorized to haul among other things, household goods under contracts with persons who operate fish and food processing business. Would that be illustrative of what you mean by a keystone restriction?

A. That would be my conception of one type of a keystone restriction.

Q. Had the Commission in this permit used the term instead of stock in trade of drug stores, the term stock in trade to drug stores, would that have been in the direction of a keystone permit as you understand it?

A. No; that is not my understanding of a keystone restriction.

Q. But it is such as I have illustrated here, where the type of person to be served is specifically named in the permit.

A. To make my meaning a little more clear and in answer to your question: Had the permit authorized the transportatoin of stock in trade of drug stores, and had that terminology been further followed with words to this effect: Under contract with persons who operate drug stores, that latter phrase is my conception of a keystone restriction and would have privileged the holder of such a permit to transport stock in trade of drug stores, provided that the holder of the permit had a contract with persons who operate drug stores.

Q. In reaching the opinion, did you also take into consideration the Commission had defined household goods as used in your permit as meaning amongst other things,—[fol. 331] the furniture, fixtures, equipment and property of stores or other establishments, or a part of the stock, equipment or supplies of such stores?

A. That is correct. During the course of my employment by the Commission I have had occasion to read the Commission's definition defining the term household goods and the definition, in brief, as defined by the Commission in 17-MC-C-467 was as follows and I am quoting:

"The term household goods means personal effects and property used or to be used in a dwelling with a part of the equipment or supply of such dwelling; furniture, fixtures,——"

Mr. Scanlan: Isn't this all in Exhibit 8?

By Mr. Blanchard:

Q. You are reading the last paragraph of Exhibit 8?

A. I am.

Q. That is what you rely upon?

A. Yes.

Q. You are familiar with the procedure which the Commission followed in grandfather applications. That is, the formal way in which the applicant presented his files?

A. I am generally familiar with that.

Q. What was the first official action which the Commission took at the end of its processing of a grandfather clause application? Did they just issue the permit without any intervening steps?

A. Not at that time. It is my recollection and understanding that after some investigation had been made of [fol. 332] an applicant's application for operating authority, based upon claimed grandfather operations, and when they were satisfied with what the applicant had been doing since prior to the passage of the Motor Carrier Act, and when they were satisfied that the carrier was in compliance with the insurance and tariff filing requirements, that at that time a document was issued by the Commission which was commonly known as a compliance order.

And such compliance orders were then issued by the Commission to the Carrier, the effect of which was to permit the Carrier to continue to perform the transportation set forth in the compliance order until the actual certificate or permit was issued?

Q. I believe this record shows, Mr. Peters, that the compliance order in this case was made in February, 1938, and there was no permit issued on that until 1942?

A. That is my recollection.

Q. Is the compliance order the first occasion on which the Commission defines what commodities the evidence has shown to it that the applicant is entitled to haul?

A. That is my understanding.

Q. Do you know of any more accurate or directly related matter to which you can refer in interpreting a permit than to refer to the compliance order of the Commission on which that permit is based?

A. I do not know of any other step that can be taken [fol. 333] than to rely upon the preceding order of the Commission, which sets forth what the operations are which the applicant is privileged and entitled to engage in.

Q. And did you in this case assume that when the Commission issued that permit, it intended to cover the same transportation which appeared defined in this compliance order?

A. That is correct.

Mr. Blanchard: The compliance order,—would your honor like to have us call attention to the point? It is already in the record and we will use it in our brief. The point is the compliance order did not authorize the transportation as such of household goods, stock in trade of drug stores. It authorized transportation of commodities described below, i.e., household goods and stock in trade of drug stores and without any reference whatsoever to whom such commodities should be transported.

Mr. Cohn: I didn't understand this was the time to argue the case.

Mr. Blanchard: You may take it off the record if you wish. I was asking the Examiner if he would like to have the witness call attention——

Exam. Sweeney: By asking questions.

Mr. Scanlan: Mr. Blanchard is attempting to brief the case in the record. There was no argument called for. It is objectionable. The proper place to brief the case is in a brief.

[fol. 334] Mr. Cohn: I would like to object to the question being directed to the Examiner at this time.

Exam. Sweeney: You can bring that information out by questioning the witness.

By Mr. Blanchard:

Q. Mr. Peters, what, if anything, did you note interpreting the order through light of the meaning of the permit? I am talking about the compliance order.

A. I noted there was a dollar difference in the terminology of the compliance order dated February 14, 1938, as compared with the original permit issued to Andrew G. Nelson, doing business as Nelson Warehouse & Express Company, or the permit issued to Andrew G. Nelson Inc. in that the compliance order stated that the business of the applicant as authorized by such order in interstate or foreign commerce as a contract carrier by motor vehicles, of the commodities indicated over irregular routes, and then the compliance order set forth the commodities which were authorized to be transported by the holder of such authority; whereas the permit issued to Andrew G. Nelson, doing business as Nelson Warehouse & Express Company, or to Andrew G. Nelson Inc. contained no terminology specifically using the word commodities.

Q. And based upon your consideration of the facts, did you or did you not, invest your own money and was not Mr. Nelson informed or your conclusions before he invested his money in this project?

[fol. 335] A. He was and I did.

Mr. Blanchard: That is all. You may inquire.

Cross examination.

By Mr. Cohn:

Q. Mr. Peters, what significance do you place on the fact that there is a difference in the language used in the compliance order and in the initial permit issued in this proceeding?

A. Mr. Cohn, to my mind there is a very, very decided significance between those two operating authorities. To my mind what this compliance order dated February 14, 1938 states is that the commodities which the holder of this operating authority is authorized to transport consists of new and used store fixtures, new and used household goods, and stock in trade of drug stores.

It specifically gives me the impression that certain commodities are authorized to be transported and nowhere in this compliance order is there any explanation that these commodities are to be transported to a particular class of shipper or shippers.

Q. Now, is that a broader use of the language than the permit; is that in your permit? That is, does that authorise transportation of commodities; to permit is somewhat restrictive; is that your point?

A. Not exactly. I think that in interpreting the present permit as it reads, it must be interpreted in the light of [fol. 336] any previous order which may throw some light as to what was meant by the grant of the operating authority.

Q. All right; now, the permit reads that the transportation service to be performed by the carrier shall be specified below. Do you conceive that to be a different type of authority than the authority that is set forth in the compliance order?

A. Your reading of the present terminology of the operating authority did not contain the word or the phrase commodities, whatsoever. My thought has always been that in interpreting the present operating authority one must refer to any previous order that has been issued which may throw some light upon what the holder of the present authority may do under it.

Q. Well, now, the permit which was issued is the general form of permit issued by the Interstate Commerce Commission to contract carriers under the grandfather clause, is it not?

A. It is one type of general permit issued.

Q. Isn't it a fact that in the early days of regulation, that grandfather permits were issued without keystone restrictions?

A. I am acquainted with the fact that permits have been issued without keystone restrictions.

Q. As a matter of fact the keystone case was one that was initiated some time after the grandfather date, was it not, by the Commission?

A. I believe that to be correct.

Q. And that later permits that were issued subsequent to [fol. 337] the findings in the Keystone case, particularly those new operations or extensions of operations containing the Keystone restriction?

Mr. Diehl: I object on the following grounds: Mr. Cohn assumes a situation that doesn't exist. The Commission today is issuing permits on occasion without a Keystone restriction, to contract carriers. Mr. Cohn's implication is that all permits issued since the Keystone case do have attached to them such a restriction, and that situation does not exist. I therefore object because the question is based upon a false basis.

Mr. Cohn: Now that counsel has sufficiently apprised the witness, I think we should have an answer.

Exam. Sweeney: I think the record is now clear with your explanation, Mr. Diehl. You may continue, Mr. Cohn.

The Witness: Will you have the reporter repeat the question?

(Question repeated.)

A. It is my recollection that where the applicant has only been able to make out a case or show that he was transporting commodities for a particular shipper or class of shippers, then the Commission would insert a Keystone restriction and it is also my recollection where the applicant has been able to make out a case showing transportation, generally speaking; that permits have been issued without the insertion of any Keystone restriction.

By Mr. Cohn:

Q. And that is your interpretation of the Keystone case [fol. 338] based upon your experience as an official with the Interstate Commerce Commission?

A. What?

Q. Your statement you just gave is your interpretation of the purpose of the Keystone restriction?

A. I did not give an interpretation of the Keystone restriction in my last answer, to my knowledge.

Q. Your understanding is that the Keystone restriction is only imposed upon the basis of the proof in a particular case as to the holding out to serve a particular shipper or number of shippers?

A. That is one of the factors that the Commission takes into consideration in the grant of its operating authority.

Q. And it is not based upon the type of authority as to the commodities which are authorized, is that your interpretation?

A. That may be a factor.

Q. Isn't it the important factor that where a wide gamut of commodities are authorized to a contract carrier, that the Commission will invariably impose the Keystone restriction in present cases?

A. That may be a factor.

Q. Isn't it the important factor?

A. What do you mean by important factor?

Q. Isn't it the great important factor in regard to the imposition of Keystone restrictions,—the type of commodities offered?

[fol. 339] Mr. Blanchard: I object. The courts have very definitely refused to allow the Commission merely because they change their policy some time after they issue a permit, to go back and apply that policy to some permit they issued under a former policy.

Now, the questions are clearly directed to the Commission's change of policy after this permit was issued and on this ground they are totally irrelevant. If the Commission came out today with a policy that they would not issue any contract permits at all, they couldn't rely on that policy which had been invalidated under——

Exam. Sweeney: We haven't any dates specified setting forth when the policy changed; I don't know when the policy changed.

Mr. Blanchard: The dates are on the orders.

Exam. Sweeney: I am not talking about the orders. Mr. Cohn didn't say when the Keystone case was decided.

Mr. Blanchard: Can't we stipulate on that Keystone case?

By Mr. Cohn:

Q. Do you recall, Mr. Peters?

A. I do not recall specifically.

Mr. Cohn: My recollection is it was 1939.

Mr. Lillie: Do you want the information?

Exam. Sweeney: If it is 1939 you are correct, Mr. Blanchard.

Mr. Blanchard: He is talking about putting a Keystone restriction in every contract permit to carriers; that is irrelevant.

[fol. 340] Exam. Sweeney: I think the last question is objectionable because this witness doesn't know what factors the Commission itself uses in making its decisions.

Mr. Cohn: Except the witness injected the Keystone case.

Exam. Sweeney: He can give his opinion as to what they think.

Mr. Cohn: I will not pursue that question.

Mr. Blanchard: May we stipulate that if either party refers to the Keystone case, the date——

Mr. Cohn: I am willing to let the decision be taken official notice of in this case.

Mr. Blanchard: Yes; we don't need to stipulate it. My point is the Keystone was in 1939; the permit was not issued until 1942.

Mr. Cohn: The compliance order was issued in 1938.

Mr. Blanchard: Yes.

By Mr. Cohn:

Q. Mr. Peters, in connection with your investigation of the operations of Andrew G. Nelson Inc. prior to the time you made your investment as you testified, did you determine whether or not the contracts of Andrew G. Nelson Inc. that were in effect at the time you were negotiating for the purchase were on filed with the Interstate Commerce Commission?

A. I did not.

Q. You did not investigate the matter of the compliance by Andrew G. Nelson Inc. with the provisions of the Inter- [fol. 341] state Commission in that regard?

A. I did not make any check to determine what if any contracts were on file with the Commission.

Q. Now, since you have taken over by stock purchase the control of the respondent, has your company entered into and filed additional contracts?

A. I understand that they have.

Q. And are those shown on Exhibit 3 in evidence in this proceeding, as those that were entered into subsequent to April, 1953?

A. I would like to see Exhibit 3. That is probably correct, although I had no part in the preparation of the information contained on this Exhibit 3.

Q. But you are familiar, are you not, with the matter of the filing of contracts with the Interstate Commerce Commission subsequent to April 1, 1953 by the respondent?

A. I am familiar with the fact that a copy of every contract entered into by the respondent company is filed with the Interstate Commerce Commission.

Q. Now, will you refer to Exhibit 3 and state whether all of the contracts that are indicated therein as having been effective after April 1, 1953 have been filed with the Interstate Commerce Commission by the respondent?

A. I understand that they have been, although I have nothing to do with the actual sending of a copy of that, myself. To make my answer more clear, I do not participate [fol. 342] actively in the management or conduct of this business. Mr. Harold Nelson, the president, devotes all of his time and attention to the management and supervision of the business, and he merely calls upon me for advice and consultation.

Q. Now, in connection with your investigation of the operations of the respondent prior to the time you entered into the contract to purchase its stock, did you investigate the file of respondent to determine whether or not there had been any correspondence concerning an interpretation of the words used in the permit?

A. No, I have no recollection of having investigated any file.

Q. You did not consider that of sufficient importance to include that in your investigation?

A. I just did not investigate it, Mr. Cohn.

Q. Are you familiar now with a letter signed by W. Y. Blanning, which is in the official file of the respondent's in Washington with the Interstate Commerce Commission, dated June 27, 1951 directed to Mr. R. D. Reeds, traffic manager, E. J. Brach & Co., Chicago, Illinois?

A. May I see that letter.

Q. I will show you a photostatic copy of the letter.

A. I don't recall ever having seen such a letter.

Q. Have you ever seen a letter from Mr. W. Y. Blanning, director, which is also part of the official file, dated October 30, 1953 to Mr. W. L. King, Motor Vehicle Section, Public Service Commission, State of Michigan, Lansing, [fol. 343] Michigan, with respect to an interpretation of the operating authority of this respondent?

A. May I see that letter?

Q. Yes; I will show you a photostatic copy of the letter.

A. I don't remember ever having seen this letter before.

Q. Now, with respect to your Exhibit 8, do I understand that to be a reproduction of a portion of a tariff, tariff reference of which is indicated therein?

A. That is what it purports to be.

Q. Now, the underlining there under note 2 of the words: "or other establishments" the word "stock" and the words again "or other establishments" are your own, is that correct?

A: No, it is not. I had nothing to do with the underlining of anything contained in this exhibit.

Mr. Blanchard: May we stipulate that those underlinings were not in the tariff as originally filed with the Commission?. Somebody took this page and underlined it and in photostating them, we had to leave that there.

Mr. Cohn: There is no significance to the fact that certain words are underlined?

Mr. Blanchard: None whatever. We underlined stock.

By Mr. Cohn:

Q. Is it your interpretation of the term household goods that it refers to stock in trade of drug stores?

A. I will try to answer your question this way, Mr. Cohn. I think in my opinion that the definition as contained here [fol. 344] may have a very broad connotation because the Commission defines household goods as the personal effects and property used or to be used in a dwelling, when a part of the equipment or supply of such dwelling; it further defines it as consisting of: Furniture, fixtures, equipment and the property of stores, offices, museums, institutions, hospitals, or other establishments, when a part of the stock, equipment or supply of such stores, offices, museums, institutions, hospitals or other establishments.

It is my opinion that this definition may be broad enough to authorize the hauler of new or used household goods to transport the stock in trade of drug stores, yes.

Q. Then would you say that on Exhibit 2 which is in evidence here, that any of the items that are contained therein, in your opinion, can be transported under the authority of the respondent to transport household goods?

A. I don't know that I am qualified to answer that. I have spoken to persons whose judgment I think is sound, and they have given me their opinions which confirms to me that possibly this interpretation may be broad enough to cover these items shown in Exhibit 2.

Q. That would be all of the items, then?

A. Possibly.

Q. Now, at the time that you purchased the stock of the respondent your investigation had included a review of the [fol. 345] permits that were issued to the respondent and to the predecessor, Mr. Nelson, as an individual, had it not?

A. Yes, sir.

Q. And at the time you purchased the stock in this corporation you knew, did you not, of the arrangement with Mr. Jess Hart that has been testified to here by Mr. Nelson?

A. I knew that Mr. Hart had been employed by Mr. Andrew G. Nelson in a certain capacity.

Q. That arrangement was in effect at the time you purchased the stock, was it not?

A. I believe it to be correct.

Q. Now, during the time that you were employed in the office of the Interstate Commerce Commission at Chicago; that is, the Bureau of Motor Carriers' district office in Chicago, was the operation of respondent or its predecessor, one that was under your jurisdiction as a supervisor?

A. I believe it was, sir. I had charge of a certain territory which embraced the south side and Mr. Andrew G. Nelson conducted its operations from a point which was included within the territory which was under my supervision.

Q. I believe you stated there had been no complaint made against the operations of Mr. Nelson during that time, to your knowledge?

A. I don't think I so testified.

Q. What was the fact; was there any complaint made as to the manner in which Mr. Nelson operated either com- [fol. 346] modity-wise or territory-wise under the permit?

A. Not to my knowledge.

Q. Did you make any investigation on behalf of the Commission, of the operations?

A. Not to my knowledge.

Q. So that the matter of the interpretation of the permit was never called to your attention in an official capacity?

A. No, sir, it was not.

Mr. Cohn: I believe that is all I have.

By Mr. Scanlan:

Q. As I understand it, Mr. Peters, you began negotiating for the purchase of stock of Mr. Nelson in approximately April of 1952?

A. About that time, Mr. Scanlan.

Q. Now, I didn't quite understand your testimony; what percentage of the stock do you presently own?

Mr. Blanchard: I object unless the witness wishes to volunteer that.

A. I own slightly half of the authorized stock.

By Mr. Scanlan:

Q. I didn't understand the half, slightly more than or less than half?

A. Less than half.

Q. Does Harold Nelson own the balance of the stock?

A. He owns slightly less than half of the authorized stock.

Q. And then I assume you have a third shareholder?

A. No; there are only those shareholders.

[fol. 347] Q. And you each own less than the half?

A. Yes, sir.

Q. What happens to the balance?

A. It has been unissued.

Q. Putting it this way, then: Do you *you* and Mr. Nelson own an equal amount of the stock?

A. We own the same number of shares of issued stock.

Q. So that the stock that has been issued has been divided equally between you and Mr. Nelson?

A. That is correct.

Q. Now, I assume that in part of the negotiations that were conducted between you and Mr. Nelson, you made an effort to determine the amount of business conducted by Mr. Nelson in interstate commerce?

A. No, sir.

Q. That didn't concern you?

A. No, sir.

Q. In other words, you made no effort to determine what the amount of business was that was done by Mr. Nelson in 1950, for example?

A. No, I did not, Mr. Scanlan. We spoke to Mr. Andrew G. Nelson on a number of occasions. We determined from the information that he gave us that——

Q. Mr. Peters, you have answered my question.

A. I didn't complete it.

[fol. 348] Mr. Scanlan: I asked him if he made any effort to determine what business was done by Mr. Nelson in the year 1950 and he said No.

Mr. Blanchard: Do you wish to explain the answer?

Mr. Scanlan: He can do it on redirect.

Mr. Blanchard: It is not necessary to split it that far apart in the record. The witness has a constitutional right to explain any answer he makes and I ask the Examiner to give him that right.

Exam. Sweeney: Nothing prevented you from making an investigation, did it?

The Witness: Nothing prevented me from making an investigation, and the scope of our investigation included various discussions with Mr. Andrew G. Nelson.

Exam. Sweeney: You are talking about an investigation you didn't make. Did anything prevent you from making the investigation?

The Witness: No.

By Mr. Scanlan:

Q. Now, what was the purchase price of this stock of Mr. Nelson?

Mr. Blanchard: I object, unless the witness wishes to volunteer the information. It is not proper cross examination. I don't think it is necessary to disclose business secrets to competitors.

Mr. Scanlan: If he has a desire to hide it from the Com-[fol. 349] mission, I won't press the question.

Mr. Blanchard: It isn't a matter of hiding it from the Commission.

Exam. Sweeney: Do you wish to volunteer it.

Mr. Blanchard: I am not objecting if you want to volunteer it.

The Witness: I can see no purpose in disclosing the purchase price of the stock but for your personal information.

By Mr. Scanlan:

Q. It is not for my personal information.

A. I see no reason to conceal it. To the best of my recollection we paid approximately $27,500 for the stock, which was transferred from Mr. Andrew G. Nelson to Mr. Harold E. Nelson and myself.

Q. And you paid that sum of money without attempting to determine what business, if any, was being conducted by Mr. Nelson?

A. That is not correct. We did determine that Mr. Andrew G. Nelson was engaged in the interstate transportation of commodities under the authority granted him by the permit, and that his permits were outstanding and in good force and effect, and we did then decide to purchase the stock and we did purchase it.

Q. Now, getting back to the question I asked before that: you made no attempt to determine what business was conducted in 1950, 1951, or 1952?

A. We did not check any of his previous records to de- [fol. 350] termine what volume of business he had been doing.

Q. Now, Mr. Peters, you mentioned the fact that during the time that you were with the Commission, to your knowledge no complaint was made as to any operations conducted by Mr. Nelson, or no one questioned the operations of Mr. Nelson, is that correct?

A. That is correct to the best of my knowledge.

Q. Isn't it a fact, Mr. Peters, that those operations were terminated by order of the Commission? In other words, they were suspended?

A. I believe, Mr. Scanlan, that Mr. Andrew G. Nelson made application for a temporary suspension of his operations during the war years and the Commission issued an order authorizing him to temporarily suspend his operations and that subsequently the Commission issued an order ordering him to reinstate his operations, and that Mr. Andrew G. Nelson did so comply with the order of reinstatement and did reinstate his operations.

Q. How many years were the operations suspended?

A. I don't know.

Q. Well, then, of course during the years that the operations were suspended there would be no question by any one as to the scope of the permit, or to the legality of any operations conducted because none were being conducted, is that correct?

A. That may be correct.

Q. Now, after the operations of Mr. Nelson were reinstated, and by reinstating he placed insurance on file, is that correct?

[fol. 351]

A. Yes; that is correct. He placed insurance on file and it is my recollection that he resumed operations and reinstated his operations in 1946, some time in 1946.

Q. Now, do you know that he hauled one pound of freight in interstate commerce in 1946?

A. I do not know of my own knowledge what he was doing in 1946, Mr. Scanlan.

Q. Do you know whether or not he hauled one pound of freight in 1947?

A. I do not know of my own knowledge what he was doing in 1947.

Q. And your answer, I presume, would be the same for 1948, 1949, 1950 and 1951.

Mr. Blanchard: I have been waiting patiently; I can't conceive how what Mr. Nelson was doing in 1946, 1947, 1948, 1949 or 1950 has the slighest bearing on the interpretation of this petition. If Mr. Scanlan will disclose its bearing on the basic questions, perhaps I will withdraw the objection but until he discloses some avenue of relevancy in that question I will have to object to it.

Mr. Scanlan: It is very simple. They make quite a point in their direct testimony that during the 10 years that Mr. Peters was associated with the Commission, to his knowledge no complaint had ever been made about the operations, that no one had questioned the operations, and the same thing was done with Mr. Nelson on his direct examination. Quite obviously, if no operations were being conducted, no one should have any occasion to question; and that is the simple point that I am developing.

[fol. 352]

Exam. Sweeney: If that is the point I can see a remote relevancy just as rebuttal, not as to the basic question at all. Objection overruled.

A. My answer is that I have no personal knowledge of what operations Mr. Andrew G. Nelson was conducting in those years after he reinstated his operations in 1946.

By Mr. Scanlan:

Q. Now, Mr. Peters, at the time that you purchased the stock in the Andrew G. Nelson Company, approximately April 1, 1953, did the corporation own any equipment?

A. I don't know whether it did or did not, Mr. Scanlan. We did not purchase any equipment from Mr. Nelson or from his corporation. We merely purchased his stock and in determining what the stock had, it is my recollection——

Q. Now, just a minute; I am not asking for a speech.

Mr. Blanchard: Will you let the witness answer?

Mr. Scanlan: I will not. I am not going to get a speech every time I ask a question.

Mr. Blanchard: I am going to object to the question.

Mr. Scanlan: You may object all you want. You know that is not the proper way to answer.

Exam. Sweeney: The witness may continue his answer.

[fol. 353] A. It is my recollection that the corporation did not own any equipment in its corporate name.

By Mr. Scanlan:

Q. Thank you, Mr. Peters. Do you know, Mr. Peters, when the decision of the Interstate Commerce Commission was rendered in 17-MC- C-467?

A. I do not recall the specific date.

Q. Do you know whether there have been any re-hearings on that decision?

A. It is my recollection there have been several hearings on that particular matter.

Q. Are you familiar with the fact that there have been at least several decisions construing the decision of the Commission in 17-MC-467?

A. I have a recollection there have been several decisions in that particular connection.

Q. Now, Mr. Peters, did I understand your testimony correctly to the effect that household goods as defined by the Commission and as shown in your Exhibit 8, I believe, would authorize the transportation of the commodities that are shown in Exhibit 2 under the paragraph captioned: Property Transported?

A. I think the definition in 17-MC-C-467 may be broad enough to include the transportation of the commodities shown in Exhibit 2.

Q. And taking into consideration, of course, Mr. Peters, the movement from the particular consignor to the particu- [fol. 354] lar consignee involved, is that correct?

A. I think so, Mr. Scanlan.

Q. Now, I believe you stated that the operations of Andrew G. Nelson Inc. were being conducted by your associate, Mr. Harold E. Nelson?

A. I stated that Mr. Harold E. Nelson, the president of the company, devotes all of his time to the management and supervision of the operations of the company.

Q. And that your participation in the business is in a supervisory or consulting basis?

A. That would be a fair statement, Mr. Scanlan.

Q. I take it, then, Mr. Peters, that you have other activities other than the trucking business?

A. Yes; I keep occupied otherwise, Mr. Scanlan.

Q. And would you say that those other activities would take what percentage of your time?

A. I would say that they would take—heretofore, up to now, they have taken practically all of my time.

Q. And up till now little of your time has been put in on this particular operation?

A. Not too much of my time.

Mr. Scanlan: That is all.

By Mr. Crouch:

Q. Does your company own any equipment as of today?

A. It does.

[fol. 355] Q. One other question: Are these opinions which you have been giving us as to the authority, and that can be hauled on this permit, and for household goods as what you might haul on household goods,—are they the same opinion which you were giving out when you were district supervisor in connection with the Interstate Commerce Commission?

A. Well, in my capacity as district supervisor I was called upon by many persons to explain an opinion and to interpret certain phrases of operating authorities, and I interpreted them to the best of my knowledge and ability at that time.

Q. Were they the same interpretation as you are putting on these data?

A. I don't know that at that time such a question was ever asked of me or raised ~~of me~~, or that point came up, or that I ever expressed an opinion than as I have right now, that no similar set of facts ever confronted me, to the best of my recollection.

Q. You mean to tell me that in four years of being a district supervisor you were never asked to interpret what could be hauled under household goods?

A. Yes, and I then would inform my questioner as to how the Commission had defined the term household goods and would give him an opportunity to read it.

Q. And did you tell him he could haul beer at that time?

A. I told him he could haul what the Commission stated [fol. 356] he could haul in their definition of the term household goods.

Mr. Crouch: That is all.

Mr. Blanchard: Any more cross examination?

Exam. Sweeney: I don't think so.

Mr. Blanchard: May I ~~leave~~ the record a minute.

Exam. Sweeney: Yes; off the record.

(Discussion off the record.)

Exam. Sweeney: On the record.

Redirect examination.

By Mr. Blanchard:

Q. Mr. Peters, I hand you herewith Order of the Commission in MC-1194 which is in the docket in that case, authorizing suspension of operations of Andrew G. Nelson during the war. Will you please give me the date of that Order?

A. This Order of Suspension authorizing Andrew G.

Nelson, doing business as Nelson Warehouse & Express Company——

Exam. Sweeney: Can't you answer the question? You are going off into something he didn't ask you. He asked you the date of the Order.

A. (Continued) The date of the Order is November 3, 1942.

Mr. Diehl: And what is the effective date?

By Mr. Blanchard:

Q. And it authorizes what effective date?

A. It states the Order shall become effective 12th of December, 1942.

Q. I hand you another order in the docket of the Commission bearing the same docket number, authorising re- [fol. 357] sumption of operations and ask you the date of that order.

A. The date of said order is January 23, 1946.

Mr. Blanchard: I will not offer these in evidence, Mr. Examiner, because they are in the Docket 1194 file.

Exam. Sweeney: Very well, Mr. Blanchard.

By Mr. Blanchard:

Q. In attempting to answer one of Mr. Scanlan's questions, and I believe in attempting to state why your investigation of the prior business of this carrier, Mr. Scanlan interrupted you and cut you off in your answer, is there anything in the answer to that question that you wish to state now for the record? Do you recall the question?

Exam. Sweeney: Mr. Blanchard, I told the witness to continue.

Mr. Blanchard: The second time you did, but the first question, he was interrupted the first time before I objected.

Mr. Diehl: He was explaining the nature or the extent as to the reason why or not he conducted a more thorough investigation of the prior operations of the carrier.

By Mr. Blanchard:

Q. You started to answer to it and Mr. Scanlan interrupted you and you said that is all I want to answer.

Mr. Scanlan: And the Examiner asked if you had answered the question.

Mr. Blanchard: That is the second question I asked of the witness. If there is nothing else that the witness wants to point out, I have nothing further on that at this time. [fol. 358] I think that is all, Mr. Peters.

Recross examination.

By Mr. Scanlan:

Q. Mr. Peters, in reading the orders of suspension and the orders of resumption, you might call them, I note that the order of November 3, 1942 showed that the permit was issued to Nelson Warehouse & Express Company on March 13, 1942; that is correct, is it not?

A. I believe that that is the date of the issuance of the permit.

Q. And this order was issued, and by this order I mean the order of suspension, authorising the suspension of operations, was issued approximately 9 months after the permit had been issued?

A. If the dates are correct, I would presume that to be correct, Mr. Scanlan.

Q. Now, based on the experience you have had with the Commission, isn't it a fact that it took the Commission sometimes two or three months to act on a petition of this type?

A. In my experience it did take the Commission some time to do what was asked of it.

Q. So that this Andrew G. Nelson would have been asked to suspend his operations about six months after the issue of the permit?

Mr. Blanchard: The record shows the man was operating on his compliance authority before the order of the Commission asked him, ending his permit. This man operated [fol. 359] for four years on a compliance order.

Exam. Sweeney: There is no false impression created.

Mr. Blanchard: Then I withdraw the objection.

Mr. Scanlan: Further, I would like to correct Mr. Blanchard's statement that he conducted operations for four years. This record is devoid of any such showing.

Mr. Blanchard. That we will have to argue out when we get the record.

By Mr. Cohn:

Q. As I understand, at the time you purchased the stock of Respondent in April, 1953, the only assets of the corporation were the Interstate Commerce Commission permit and underlying state permits?

A. No, sir; none of the intrastate authority that Mr. Nelson held was purchased.

Q. I mean the underlying interstate authority in the various states.

A. Yes.

Q. And that was all that the corporation owned, that went along with the purchase?

A. Yes.

By Mr. Crouch:

Q. What else was in the corporation besides the permit; any other assets whatever?

A. Yes; the corporation had a bank account at that time. The amount of the bank account was approximately $1700 or $1800, the balance in their bank account, and that was [fol. 360] assumed as a part of the purchase price.

Exam. Sweeney: We will have a five-minute recess.

(Five-minute recess.)

Exam. Sweeney: On the record.

Mr. Blanchard: I will call Mr. Harold E. Nelson.

HAROLD E. NELSON was sworn and testified as follows:

Direct examination.

By Mr. Blanchard:

Q. Will you state your name and address?

A. Harold E. Nelson; 6717 Lightfoot Avenue, Chicago, Illinois.

Q. And you are the Harold E. Nelson who has been heretofore referred to in this record as the president of the respondent corporation?

A. I am.

Q. Have you heard the testimony as to the time of the acquisition of this stock and the purchase price, etc., as given by previous witnesses?

A. I have.

Q. Was that correct?

A. That was correct.

Q. Since you began the active operation of the company, was there any occasion when any of your operations were questioned by the Commission as one instance of which you came down to confer with the Bureau?

A. There was.

[fol. 361] Q. Will you tell us what that instance was?

A. Dates I cannot give you; but it was last Fall, I believe, I got either a letter or a telephone call to come down to see Mr. Reymond in reference to a letter he had received from Dairypak, Inc.

Mr. Diehl: Harry Raymond, district director for the Bureau of Motor Carriers of the Interstate Commerce Commission, here in Chicago?

The Witness: That is correct. I don't recall whether the letter was from Dairypak or from some attorney, but there was a letter with reference to my contract with Dairypak.

By Mr. Blanchard:

Q. What was the contract with Dairypak, and what was the commodity covered by the contract?

A. At the time we entered the contract, I was under the assumption that Dairypak made various types of cartons, paper cartons, and in my tariff I had a——

Q. You mean your schedule?

A. In my schedule,—I had rates on file for cartons, and I entered into a contract with him, assuming that I had the authority to haul those cartons.

Q. What kind of cartons were they?

A. Well, later it developed that the cartons we were hauling were knocked-down milk cartons.

Q. And what was the occasion; is that load illustrated in Exhibit 2 as Load 7?

[fol. 362] A. That is correct.

Q. Now, what happened at that conference when you came down to see Mr. Raymond?

A. Well, we had quite a discussion and they asked me whether I thought that a milk carton was a part of the stock in trade of a drug store, and I said: Well, drug stores sure have them; they all have milk behind their fountains, and they couldn't sell a carton of milk to a customer if it wasn't in a carton. They couldn't sell it in bulk. They said: Well, do you think that is covered by stock in trade of drug stores? and I said: Well, I don't know. I said: I will get some samples and submit them to your office and your opinion on them will be final. If I can't haul them, I won't haul them.

So we proceeded to get samples from Dairypak which took several weeks before we finally got them and I again returned to the office with Mr. Peters, on both occasions, and we discussed it and went through dictionaries looking for the translation of stock in trade of drug stores, of stock in trade, rather, and we couldn't find anything.

So we left our samples here and Mr. Peters had always insisted that I was taking too broad an interpretation, so I agreed with him: Maybe I am, and in the future I would confine my activities or attempt to confine them to such articles as are actually sold in a drug store. Since then the contract with Dairypak has been cancelled.

[fol. 363] Q. And have you or have you not solicited any traffic in that type of commodity since that time?

A. We have not.

Q. Did I understand you to say that the Commission was to advise you of its final decision in the matter?

A. Such was my understanding.

Q. Have you as yet received a final decision?

A. I have not.

Q. Did you communicate to the Commission that you had ceased soliciting that type of traffic?

A. No, I did not.

Mr. Blanchard: That, Mr. Examiner, is one of the commodities I referred to in my opening statement, where I said that notwithstanding that the grandfather applicant did haul articles of that type before the granting of the certificate, we were doubtful about whether the language standing alone in independence of that fact, was broad enough to include supplies used in connection with selling stock in trade of drug stores.

The Witness: May I make an addition to my last answer?

Mr. Blanchard: Yes, certainly.

A. (Continued) That time that I was in the Commission's office, I had stated I would discontinue hauling this product until I had received a determination from the Commission.

By Mr. Blanchard:

Q. And did you immediately issue the necessary directions so that no more would be contacted or hauled?

[fol. 364] A. That is correct.

Mr. Blanchard: For the purposes of the record, I would like to say Mr. Peters was also present. He is here in the room. If anyone wishes to cross examine him he is free to do so. I simply make that statement to avoid the accusation that Mr. Peters was on the stand and was not questioned as to this occurrence.

Exam. Sweeney: I am not sure I understand you on these fiber board boxes or cartons. Are you still contending that the authority covers the transportation of those?

Mr. Blanchard: Not standing alone. If, however, the fact that the applicant was hauling paper articles and containers and wrapping paper etc., prior, is believed by the Commission to constitute grounds for holding that stock in trade of drug stores does include such wrapping, and they intended it to include it, we would then go back into that business again, but we simply say if our position is correct and the Commission is not authorized to go behind the language of this permit, if we should win the case or that point, we would not make any attempt to haul incidental items such as that under the permit without further interpretation.

Mr. Cohn: Does that go to all supplies of that kind, those used in connection with stock in trade.

Mr. Blanchard: Articles used by drug stores but not sold; empty caps or bottles in which they fill prescriptions, wrapping paper which they wrap the product in; they don't [fol. 365] sell the paper but in the strict sense you pay for it, but you don't buy it; it is a separate transaction.

Mr. Cohn: What about things that are sold and consumed on the premises? Do you take any position on that?

Mr. Blanchard: We would say ice cream is a stock in trade and articles served over their restaurant counter; the stock would be inventoried as stock of that store; we believe we would be entitled to transport it.

Mr. Cohn: That answers my question.

By Mr. Blanchard:

Q. Are there any other occasions where, since you have exercised control of the company, your operation has been questioned by the Interstate Commerce Commission excepting the order in this case?

A. I don't understand the question.

Q. You frequently referred to cases which you refer to as being called on the carpet. Have you ever been called here to the office of the Interstate Commerce Commission to explain any other transportation in which you have been engaged since you got the company?

A. Would that cover what you would call suspension orders?

Mr. Blanchard: Let me withdraw the question.

By Mr. Blanchard:

Q. Mr. Nelson, apart from any activities in connection either with this case or with the suspension case which is set for hearing at this same time and place, were you ever in any instance since you began operating the company, [fol. 366] called to discuss whether or not your authority covered the transportation of the articles you were hauling, leaving out any reference to that case or to the articles involved in the suspension case?

A. I have never been called down to this office on anything except those milk cartons.

Q. Did any supervisor call upon you with reference to any other items and inquire as to other items and your right to haul them or any special agent?

A. We had a special agent come to our office some time last—oh, if I refer to this, I can approximately tell you the date.

Q. If you are referring to that, you are talking about something connected with this case. I have asked you to eliminate anything having to do with this case or the suspension case.

A. I don't remember the title but Mr. Velmer Lyon was in my office checking my contracts and freight invoices and making a record of the various things from which he prepared this sheet.

Q. But that was in connection with this case?

A. At that time I had no knowledge that it was in connection with this case. I had no knowledge of a case.

Mr. Blanchard: That is all.

Cross examination.

By Mr. Lillie:

Q. Mr. Nelson, with respect to this Dairypak Inc. matter I was present at that discussion, wasn't I?

A. I meant to mention it but I just failed to mention it. [fol. 367] That was bothering me after I finished my statement.

Q. And we did discuss in a general manner what this authority covered?

A. We did.

Q. And now didn't we say at that time that this was a matter that would have to be decided at the Washington level rather than in our office?

A. That is correct.

Q. And particularly in respect to the Dairypak matter; do you have a knowledge that a letter did go to them under the signature of W. Y. Blanning, Director of the Bureau of Motor Carriers, in which he did give an interpretation of that authority?

A. Well, let us say I assume such a letter was sent. I have heard of such a letter. I have heard of a number of letters.

Q. There have been a number of them?

A. There have been two or three, to my knowledge, but I have never received a copy of them. The last one I saw I secured a copy of it.

Q. Well, in those letters in which Mr. Blanning took the position that the stock in trade of drug stores authority included only commodities which then accepted by the carriers for shipment were earmarked or intended for use as stock in trade of a drug store,—didn't he take that position?

A. I didn't understand the letters to mean that. I understood the letters to say it was his informal opinion.

[fol. 368] Q. But in response to inquiry with regard to different customers you had, that letters of such nature was sent to them?

A. That is correct.

Mr. Diehl: I would like to ask Mr. Lillie a question immediately in connection with the questions just asked.

Exam. Sweeney: That is all right.

Mr. Diehl: Mr. Lillie I believe you have a carbon copy of the letter signed by Mr. Blanning which you just referred to.

Mr. Lillie: I have a typewritten copy.

Mr. Diehl: Yes; it is a carbon copy of the letter addressed by Mr. Blanning to somebody else, is that right?

Mr. Lillie: That is right.

Mr. Diehl: It wasn't addressed to this respondent?

Mr. Lillie: No.

Mr. Diehl: On the copy of the letter does it state on that copy, whether a copy was sent to this respondent?

Mr. Lillie: No, it does not.

Mr. Diehl: It shows a copy went to the shipper involved, to the attorney who filed an informal question with respect to that office, and that a carbon went to your office.

Mr. Lillie: So far as I know, there was no copy sent to Andrew G. Nelson, Inc.

Mr. Diehl: Thank you.

Redirect examination.

By Mr. Blanchard:

Q. Mr. Nelson, when you said these two letters were written by Mr. Blanning, you said you never received a copy [fol. 369] but you secured a copy. What do you mean, you never received a copy? What do you mean, from Mr. Blanning?

A. That is correct; I never received anything from the Commission.

Mr. Blanchard: That is all.

Recross examination.

By Mr. Cohn:

Q. Let me ask you, Mr. Nelson: You testified Mr. Lyon, the special agent of the Interstate Commerce Commission, was furnished certain information by you concerning the operations of the Respondent, is that correct?

A. That is correct.

Q. Did you furnish the information which is shown in Exhibit 3 in evidence in this proceeding, or any part of that?

A. Well, to make this exhibit, Mr. Lyon asked me for my contracts that I had in my files and I removed them from my files and presented them to Mr. Lyon, and he compiled the information contained on this sheet.

Q. That is your letterhead?

A. That is correct.

Q. It was prepared on your letterhead?

A. Yes.

Q. You prepared certain of that information on your letterhead, did you not?

A. I don't know who typed it.

Q. You don't recollect whether you typed part of that?

[fol. 370] A. If Mr. Lyon will say who typed it, I will agree with him.

Mr. Lyon: I testified in examination about that matter.

By Mr. Cohn:

Q. You are willing to accept Mr. Lyon's testimony on that matter in this record?

A. That these were the contracts I had, that is correct.

Q. And is the information as to the contracts that you had in effect on December 14, 1953 true and correct as stated in Exhibit 3?

A. I didn't prepare the information. I didn't check it. I couldn't say that it is correct or that it is incorrect.

Q. Can you state whether or not you added any contracts in the name of the respondent after you became associated with the respondent?

A. Oh, yes, we still add contracts.

Q. Can you name the shippers or give us an estimate of the number of shippers that were added since you acquired an interest in the respondent?

A. It would be purely a guess.

Q. Well, let me ask you to refer to Exhibit 3 and state whether the contracts that are dated after April 1, 1953 as shown therein were added by the respondent since April 1, 1954?

A. Very obviously; we took over in 1953.

Q. And that is correctly shown on the exhibit; that information is correctly shown?

A. I assume that it is. I didn't compile the exhibit.

[fol. 371] Q. Could you check Exhibit 3 and state whether it is true or not true?

A. I cannot check unless I have access to the original contracts.

Q. Then you say the matters contained on Exhibit 3 are incorrect?

Mr. Diehl: He said he wouldn't know either way.

A. I assume they are correct. I assume Mr. Lyon compiled the proper dates but you are asking me to testify to them and that I can't do.

By Mr. Cohn:

Q. You were present during the testimony of Mr. Peters with respect to the investigation made in connection with the purchase of the stock of the respondent?

A. I believe I was. I walked out of the room occasionally to have a cigarette but I was present.

Q. Did you make any investigation other than that testified to by Mr. Peters of the operations conducted by the respondent at the time you took over the stock?

A. You mean prior to purchasing the stock?

Q. Yes.

A. Well, can I tell my story on that?

Q. Can you answer whether you did make an investigation first, yes or no?

A. Yes.

Q. Did you make an investigation independently of Mr. Peters?

A. I don't know what you would call an investigation.

Q. Well, did you inspect the files of the Interstate Commerce Commission?

[fol. 372] A. I did not.

Q. Did you determine whether or not the respondent owned any motor vehicle equipment on the date you purchased the stock?

A. Did I——

Q. Did you determine whether the respondent owned any motor vehicle equipment used in interstate operations?

Mr. Diehl: You are talking about the corporation?

Mr. Cohn: The corporation.

A. I did not ask and I did not know.

By Mr. Cohn:

Q. Did you investigate the arrangement with Mr. Jess Hart which was in effect at that time?

A. I did not.

Mr. Cohn: I believe that is all.

By Mr. Scanlan:

Q. Mr. Nelson, would you please refer to Exhibit 3 if you have that? That is the list of the contracts that your company had on December 4, 1953?

A. Yes.

Q. Of the 46 contracts shown on Exhibit 3 how many of those have been filed with the Interstate Commerce Commission?

A. I assume that all of them have been filed with the Interstate Commerce Commission.

Q. Who would have charge of filing the contracts with the Commission? That would be your duty, I assume; is that correct?

A. Not necessarily, no.

[fol. 373] Q. Whose duty would it be?

A. My office manager generally takes care of that, but some of these contracts are in effect—when we purchased this company, they were in effect. We had had them, and we had nothing to do with filing them.

Q. I assume the contracts dated subsequent to April 1, 1953 are contracts entered into by you subsequent to the purchase of the stock, is that correct?

A. That is correct.

Q. Now, do you know whether or not these 46 contracts shown on Exhibit 3 have been filed with the Commission?

A. I assume they have.

Q. Have you prepared a schedule of minimum rates and charges listing the contracts that your company has?

A. Our schedule of minimum rates and charges was filed in, I believe, 1951.

Q. Have you filed any schedule of minimum rates and charges subsequent to 1951?

A. We have filed some supplements.

Mr. Blanchard: All the tariffs now in effect will be in the record.

By Mr. Scanlan:

Q. Have you filed any supplements which would show the addition of the contracts listed on Exhibit 3?

A. Actually I can't answer the question.

Q. Isn't it a fact that you have on file with the Commission only 14 contracts?

[fol. 374] A. I don't know. I am pretty sure that that is a misstatement.

Mr. Diehl: Well, if the Examiner please, it is my understanding that the contracts as filed with the Commission are not public information. They are confidential between the person that files and the Commission, and I know of no provision of the law or of the tariff filing regulations that require you to file a document which Mr. Scanlan just mentioned, to wit a supplement showing a list of these contracts, and I think the witness should be advised that there is no such requirement, and he should not be allowed to be confused by the strength of a premise that doesn't exist.

I therefore object to the questions relating to the contracts because they are not public; they are confidential information, and even the employes of the Commission, as the Examiner well knows, are not allowed to disclose the content of those things.

Mr. Scanlan: Apparently Mr. Diehl is completely unfamiliar with the requirements of the Commission as set forth by the Commission. The Commission requires that the contracts themselves be filed. They require that the contracts be filed within 20 days of the day of execution. They require that a supplement of a new schedule be issued reflecting the names of each contract, and as far as the contracts being confidential, the contents of the contracts are confidential, but the number of contracts on file with the Commission is not confidential.

[fol. 375] Mr. Cohn: Or the name of the contracting party.

Mr. Scanlan: Or the name of the shipper.

Exam. Sweeney: Do you understand that, Mr. Nelson?

The Witness: Yes.

Exam. Sweeney: You are not confused by the discussion?

The Witness: It was not my understanding, to be honest with you. And there is a lot about the rules and regulations that I don't understand. I do know we have to file a copy of our contracts.

By Mr. Scanlan:

Q. And have you done so?

A. To my knowledge copies of the contracts have been filed with the Commission.

Q. Then you are representing that the 46 contracts shown in Exhibit 3 have been filed with the Commission?

A. Largely that.

Q. You are then representing to the Examiner and to the Commission that the contracts listed on Exhibit 3 that you have before you have been filed with the Commission?

A. I have already stated that to my knowledge they have been filed, but I can't positively state it.

Q. Now, carrying that just a little further, Mr. Nelson, have you issued a schedule or a supplement which would reflect the names of the shippers shown on Exhibit 3?

A. I really can't answer that question; I don't know.

Mr. Blanchard: Mr. Scanlan, I have told you that every [fol. 376] tariff now in effect will be in this record. If we haven't complied with the law, the record is going to show it. If we have complied with the law, the record is going to show it. Why waste cross examination with this witness on matters I didn't go into on direct at all when I gave you the information that as to the evidence as to what the schedules are will be offered in this record.

I object to further cross examination on anything that I didn't remotely ask on direct examination.

Mr. Scanlan: There is no proper objection because there is no question pending.

By Mr. Scanlan:

Q. I understand, Mr. Nelson, you are still adding contracts?

A. That is correct.

Q. How many contracts have you added since the first of the year?

Mr. Blanchard: I object to that question. What remote bearing it has before this commission in this matter, I can't conceive. I object as irrelevant and immaterial.

Mr. Scanlan: If you can't conceive the relevancy I will attempt to point it out.

Mr. Blanchard: It is not a case where public convenience is involved. It is what is meant by a printed document and what relevancy it bears to what the Commission meant in 1945 or 1942 is utterly beyond comprehension. I object to [fol. 377] this and all further examination going to matters that do not bear upon the sole issue in this case,

Mr. Scanlan: One of the issues in this case is whether or not the respondent is presently conducting a legal operation in accordance with its permit.

Mr. Blanchard: I was just——

Mr. Scanlan: Please extend me the ordinary courtesy.

Mr. Blanchard: You are right; I thought you were through.

Mr. Scanlan: One of the issues that is involved here is whether or not the operations of the respondent are conducted in accordance with the terms of the permit.

If this carrier has 46 contracts on file and is still adding contracts, as the record shows, his operations are not those of a contract carrier in accordance with the terms of his permit but are those of a common carrier, and he undoubtedly knows or should know about the Commission's decision in the Midwest-Emery case dealing with this type of operation, likewise the Fishback case.

Consequently, I think it is entirely proper to pursue this type of question.

Mr. Blanchard: Mr. Examiner, you will recall that in the motion I filed last Friday with the Commission, I raised the question as to what commodity or commodities we will be called upon to defe. I. Mr. Lillie advised me that there would be no evidence offered and no commodity involved [fol. 378] which was not stated in the order except fertilizer which I asked be involved for obvious reasons.

Now, on that stipulation we have tried this case. The only issue in the case is what certain language in the permit means and if evidence of unlawful violation is to be submitted, it must be submitted within the terms of the stipulation made by Mr. Lillie and myself.

Now, this man is trying to go into the whole rank and file of the present operations of this carrier. Perhaps in a case to ask whether they are operating as a common carrier or not, this question would be relevant but it is not relevant to the question your honor is called upon to decide here. I object.

Mr. Scanlan: I submit one of the issues is whether or not this permit will authorize the operation for the public at large.

Mr. Lillie: Let me speak just a minute, Mr. Scanlan. Under the rules I have to give a notice to them of what proofs are going to be introduced in a matter of this kind, and what the issues are, and the question of whether or not they are a common or contract carrier was not involved in this proceeding.

Mr. Scanlan: I appreciate that point but he went into on his direct examination asking, and it developed they are still adding contracts to them, etc., and in view of that testimony I believe I am entitled to the same.

Mr. Blanchard: There was not one word on how many contracts they had except one, the contract with Dairypak Company which they said they had cancelled.

[fol. 379] Mr. Scanlan: You will remember you asked him was he soliciting any more of that type of freight?

Mr. Blanchard: Dairypak, yes. Ask him about all the Dairypak freight you want to.

Mr. Scanlan: You asked him if he was soliciting that type of freight.

Exam. Sweeney: I think you have discussed the question. I don't think Mr. Scanlan would be governed by any stipulations between you and the Bureau of Law. They have been permitted to intervene. He may proceed with the questions as covered by the order in this proceeding.

By Mr. Scanlan:

Q. Do you remember the question? How many contracts have you entered into since January 1, 1954?

A. I don't know.

Q. Has it been 20?

A. I do not know.

Q. Would you be willing to submit as a late-filed exhibit the number of contracts that you have?

Mr. Blanchard: I direct the witness he does not have to submit such a list of the contracts; they are not within any issue in this case.

Mr. Scanlan: It would be nice if you would let me finish the question. It clutters up the record and makes it difficult to read.

[fol. 380] Exam. Sweeney: Mr. Blanchard?

Mr. Blanchard: I am directing the witness as to his legal rights, which is my function.

Mr. Scanlan: Let me finish my question.

Mr. Blanchard: You asked him if he was willing to furnish a list.

Mr. Scanlan: You continually interrupt.

Mr. Blanchard: I don't want the witness to answer questions he doesn't have to answer.

Exam. Sweeney: Don't answer until Mr. Blanchard has a chance to object.

By Mr. Scanlan:

Q. Would you be willing to file a list of contracts which you have entered into subsequent to April 1, 1954 up until now?

Exam. Sweeney: I direct the witness he doesn't have to file that type of information if he does not wish to do so.

The Witness: I will act according to advice.

Exam. Sweeney: Would you get the advice right now? We will take a short recess if you need it.

Mr. Blanchard: I don't need a recess. I will advise him he doesn't have to do it unless he wishes to do it, unless he wants more definite advice.

Exam. Sweeney: I think he does.

Mr. Diehl: May we have a short recess?

Exam. Sweeney: Yes.

[fol. 381] (Short recess.)

Exam. Sweeney: On the record.

Mr. Blanchard: The witness is now prepared to answer Mr. Scanlan's request.

The Witness: I will prepare such a record at the request of the Commission.

Mr. Blanchard: And not at the request of counsel. If the Commission requests it, Mr. Examiner, we will furnish the record but we will not do it at the request of Mr. Scanlan.

By Mr. Scanlan:

Q. Then in response to my question, your response is No?

A. That is the answer to your question.

Exam. Sweeney: Let the record show the late-filed exhibit will not be filed.

By Mr. Scanlan:

Q. How many solicitors does your company have?

A. Clarify that. You mean just solicitors.

Q. Freight solicitors; men who solicit freight?

A. None.

Mr. Diehl: Your answer is none?

The Witness: That is correct.

Mr. Diehl: The answer is none.

By Mr. Scanlan:

Q. Do you have a party by the name of Mr. Carroll connected with your organization?

A. Mr. Carroll has been representing us in Cleveland.

Q. Cleveland and in the Ohio area?

[fol. 382] A. In Cleveland, Ohio.

Q. And what is the nature of his representation, to solicit traffic for your company?

A. No, he has gotten some traffic for our company, not much. The fact is I am not certain what traffic he did secure for us.

Q. Do you know whether he has solicited the Colonial Chemical Division of the Pittsburgh Plate Glass Company at Barbourton, Ohio?

A. No, I do not; we do no business with them.

Q. Do you do business with Diamond Alkali Company?

A. We do not.

Q. Do you do any business with Sherwin-Williams and Peterson-Sargent Company in Cleveland?

A. We do not business with them.

Q. Do you know whether or not he solicited the Firestone Tire & Rubber Company and Goodrich Tire?

A. The same answer applies to that.

Q. Have you made any efforts to restrict his solicitation of any of those accounts?

Mr. Blanchard: May it be understood ~~that~~ my objection to your questions as to matters at present or of any period after 1942, the date of the issuance of the permit, is a continuous one and I object to anything during that period?

Exam. Sweeney: That is a pretty broad objection.

Mr. Blanchard: I object as not having anything to do [fol. 383] with anything being germane to the case.

Exam. Sweeney: I will overrule the objection and we will understand it is a continuing objection on that broad basis.

Mr. Blanchard: I wish it to be understood that my objection to the inquiry as to the operations of this company as to traffic handled, points served, or companies served, or contracts entered into after 1942, the date of the permit, are irrelevant and would have no relation to any matter before the Commission in this proceeding.

I make the same objection as to any inquiry turning to the like factors: operation, contracts, etc., after the present owners acquired the control of the company.

Exam. Sweeney: Yes; we understand that is a continuing objection.

By Mr. Scanlan:

Q. Isn't it a fact, Mr. Nelson, that your Mr. Carroll has offered to enter into a contract with the companies that I have just named. Now, if you prefer, I could enumerate them again but you remember easily enough the companies I just named: Diamond Alkali, Sherwin-Williams, Peterson-Sargent, Firestone Tire, Goodrich and the Colonial Chemical Division of the Pittsburgh Plate Glass?

A. State the first part of the question.

Q. Isn't it a fact that your Mr. Carroll has offered to enter into contracts with those shippers?

A. Without my knowledge.

[fol. 384] Q. Just what, then, is your relationship with Mr. Carroll? Just what does he do for you?

A. Mr. Carroll has secured equipment to move some of our movements out of that area, and Mr. Carroll did get, to my knowledge, two contracts with people, and which I have since cancelled.

Q. Who are those people?

A. The one is the——

Mr. Blanchard: May we supply that five days after the close of the hearing?

The Witness: I will think of it.

Mr. Blanchard: Would it be on the list?

The Witness: No; they are recent contracts. It will come to me in a moment. Will you give me your next question, and I will come back to it.

By Mr. Scanlan:

Q. Did you ever tell or instruct Mr. Carroll to refrain from offering contracts to the shippers in the Ohio area?

A. No, I did not.

Q. Is Mr. Carroll employed by you on a percentage basis?

A. He is.

Q. And he receives a percentage of the business that he obtains out of the Ohio area for your company?

A. No.

Q. What is the arrangement?

[fol. 385] A. He receives a percentage of the revenue when he secures equipment for us to move certain movements.

Q. Did you think of the names of the people—they aren't shown on Exhibit 3, so it wouldn't do any good if I showed you Exhibit 3.

A. No, but I can't understand why I don't remember the names.

Exam. Sweeney: Can you recall the type of commodity?

The Witness: Yes; it is paint material and I cancelled the contract because of claims that the merchandise is very poorly packaged and claims exceeded the profit on the movement.

By Mr. Scanlan:

Q. What type of paint materials was it?

A. I imagine it is various types of paint materials.

Q. I mean the particular items you had so many claims on; what were those?

A. I don't handle the claims so I really couldn't say. I just see the amount of the claims and that is why I cancelled the contracts.

Q. Do both contracts cover certain paint materials?

A. Correct.

Q. And by paint material do you mean an ingredient that would go into making paints?

A. No; paints.

Q. I thought you said paint materials.

A. Well, I should have said paints. Painting materials and paints.

[fol. 386] Q. Why would there be so many claims on paint?

A. I can't understand it. The containers that they were putting them in were too light for the commodity that they put in the containers, and they collapsed.

Q. Now, I believe you mentioned that his duty was to obtain trucks to obtain this freight back, is that it?

A. That is correct.

Q. And that when he obtained the trucks he would then get a percentage of the revenue that was derived, is that it?

A. That is correct.

Q. Does he work in a gas station there in Cleveland?

A. I don't know where he works now; he has moved.

Q. What gas station was he formerly in, do you remember?

A. I can just about—let me think if I can tell you the street. I have been in Cleveland once and saw Mr. Carroll.

Q. Well, that is not too important. In other words, he will go out and trip-lease equipment and utilize that equipment to haul the freight?

A. That is what he has been doing in the past, in the slightly distant past.

Q. Is he doing any differently now?

A. Yes; he isn't entering into any more trip leases for us.

Mr. Scanlan: I think that is all.

By Mr. Crouch:

Q. Did he inspect the equipment for you when he made these trip leases?

[fol. 387] A. I haven't the slightest idea of what were his duties or what he did.

Q. Who had charge of the inspection of your leased equipment, who would know that?

A. He should inspect it.

Q. You testified that when you bought the stock of this corporation you didn't check to see whether there were any trucks owned by the corporation. Do you mean to tell the Examiner that you weren't interested whether there were any trucks in the corporation that you were buying the stock of?

A. We were not interested in purchasing anybody's trucks. There were no trucks involved in the sale of this corporation.

Q. I understood you to say you didn't know whether there were any trucks in the corporation.

A. I didn't know because when we purchased the corporation we were not interested in the equipment. I don't know whether the company ever owned any equipment or not.

Q. If you bought the stock and there were trucks in it, you should have got them?

A. If the trucks were part of the corporation we should have acquired it. Maybe I overlooked something.

Mr. Crouch: That is all.

Exam. Sweeney: Is there any further cross examination?

(No response.)

Mr. Blanchard: I have no redirect.

[fol. 388] Exam. Sweeney: The witness is excused; thank you.

(Witness excused.)

Mr. Blanchard: Mr. Examiner, at this time I myself find it necessary, in my client's interest, to make a further motion. As the record shows the week before the hearing I made a motion to make the record more definite and certain. I have indicated the extent to which Mr. Lillie informed me and resolved most of the uncertainties pointed out in that motion.

Insofar as we received the information from Mr. Lillie, we make no claim we were taken by surprise or did not have an adequate time to prepare our defense.

However, as I interpreted the order of the Commission and as stipulated by Mr. Lillie, we were prepared as to certain commodities, as to certain activities which underlay the issuance of the original compliance order, and four years later, the permit, and over my objection the inquiry has broadened into fields and concerning subjects as to which I had no suspicion whatsoever would be involved in this hearing.

I refer particularly to the operations of the original permit with Mr. Hart, his operations after he began to recover from the depression, after his permit was issued, his operations right up to the time he sold the business, and even the operations of the present owners; if that information is relevant and the Commission so holds, and if this respondent is to have anything like a fair hearing, we must have an opportunity to meet these questions and [fol. 389] present the facts by such as evidence as we can assemble on these, what we regard as irrelevant subjects.

Now, we are not willing to stand on our objection of irrelevance, as anyone who has practiced before administrative bodies, they know that that is not sufficient. We may urge it, but we must have a chance to prepare evidence as to this long period of time which we had no information was to be involved.

Therefore, we ask that the hearing be adjourned for 60 days in order to permit us to secure the record and to prepare evidence of this, apparently the entire period since this carrier was permitted his issue herein in this proceeding.

I have attempted to keep that out of the record by objections and without criticism I think your honor ruled as he felt proper, but it has taken us by surprise, and therefore we ask that the hearing be adjourned to a time and place to be later fixed in order to go into it, not to be later than 60 days from today.

Exam. Sweeney: Mr. Blanchard, with respect to the last objections you made to cross examination by Mr. Scanlan, his questions elicited no information from Mr. Nelson,—he either refused to prepare a late filed exhibit or he didn't remember the contracts he had, so there is nothing on the record as to his operations since taking over the business in 1951, so I can't see that would require any answer from [fol. 390] you because there is nothing to answer. Mr. Lillie, would you care to make a statement on this requested adjournment?

Mr. Lillie: Well, as the attorney stated, he had notice of what testimony was to be put in; certainly the Commission didn't go beyond the scope of its notice.

Mr. Blanchard: Certainly it did not; there is no claim that it did.

Mr. Lillie: And any other matters that came in were purely incidental. The only thing to be determined was what the lawful construction of the permit is, what they can haul; it is based on the shipments that are shown in Exhibit 2, which are before the Commission, and it involves shipments from a relatively recent time, and all this other was simply background testimony and they put on Mr. Nelson, who testified to his operations over this whole period.

I don't know who they could put on that would know any more about them than a man who actually operated the business. I think this would just be an unwarranted delay to continue this and I think the hearing should be closed because the testimony is before the Commission now upon which they can make a determination of the questions that they have raised in this investigation proceeding.

Exam. Sweeney: I would like the record also to show that this hearing was originally set for April 20 and that the postponement was for 30 days.

[fol. 391] Mr. Diehl: Will the Examiner permit me to make an additional statement?

Exam. Sweeney: Yes.

Mr. Diehl: In justification of our request?

Exam. Sweeney: Yes.

Mr. Diehl: A good deal of time has been spent by interveners in this proceeding and by that I mean those other than Mr. Lillie with respect to operations by this respondent through an arrangement with a one Jess Hart. Considerable stress was laid upon that by both Mr. Cohn and Mr. Scanlan representing the interveners.

It is our considered judgment in the light of those developments, that a proper investigation should be made by us of that operation in the course of time, conducted under the supervision of Mr. Hart, that the records resulting from such operation belong or should be a proper part of the proceedings herein, which would enable the Commission to have a full and complete picture of what has transpired from the time of the application down to the time the question arises as to its interpretation.

I therefore strongly urge upon you that you allow us to have this continuance, and I say to you that we will develop the information which I will just outline, and will produce not only the documentary evidence we are able to discover, but competent witnesses to testify with respect to it.

I strongly urge you to give us a full and fair opportunity [fol. 392] to develop that in the light of the developments that have taken place in the last few days. I accuse no one of bad faith. I am just saying we have not had a fair opportunity in the light of developments up to this point, to full develop our case and record; I strongly urge you to do so.

Exam. Sweeney: That is a matter of opinion, Mr. Diehl. I intend to close the hearing. Do the parties desire a proposed report?

Mr. Blanchard: Yes; and perhaps 30 days after we get the record——

Exam. Sweeney: Will 30 days be sufficient?

Mr. Blanchard: We will get the record in ten days; 40 days. I have some more exhibits. I would like to have marked for identification as Counsel's exhibit, copy of respondent's tariff MF-I.C.C.-4, issued January 11, 1952, effective February 14, 1952.

Exam. Sweeney: Exhibit 9 for identification.

(The document referred to was marked Counsel Blanchard's Exhibit No. 9, for identification.)

Mr. Blanchard: Also as Respondent's Exhibit 10, copy of their tariff MF-I.C.C.-3, issued October 2, 1951 and effective November 5, 1951.

Exam. Sweeney: Off the record.

(Discussion off the record.)

Exam. Sweeney: On the record. Exhibit 10 for identification.

[fol. 393]

* * * * * * *

Mr. Blanchard: I think you will find that the tariff and the supplements which have been offered in evidence contain each minimum rate which is in effect today by the lines of the respondent.

Mr. Examiner, if there is no objection at this time I move to offer in evidence Exhibits 4 to 13, both inclusive.

Exam. Sweeney: They are received without objection.

(The documents marked Respondent's Exhibits 4, 5, 6, Witness A. G. Nelson; Exhibit 7, Counsel Blanchard; Exhibit 8, Witness Peters; and Exhibits 10, 11, 12 and 13, Counsel Blanchard, were received in evidence.)

[fol. 394] Exam. Sweeney: Briefs will be due July 12th, 1954. A proposed report will be served.

Mr. Blanchard: And will you let the record show we reserve the right to file a formal motion for further hearings, stating our reasons therefore in a much greater detail than I have stated here.

Exam. Sweeney: There being nothing further, the hearing is closed.

(Thereupon, at 12:30 o'clock p.m., Friday, May 21, 1954, the hearing in the above-entitled matter was closed.)

[fol. 395] SECRETARY'S CERTIFICATE (omitted in printing).

[fol. 396]

STATEMENT B-1-C

AFFIDAVIT.

W. E. HENRY, being first duly sworn, deposes and says that he resides at 2627 S. Oak Park Ave. in the city of Berwyn, county of Cook and state of Illinois; that he is now, and has been for a number of years, engages in the occupation of traffic manager for Walgreen Co., an Illinois corporation having it's principal offices at 744 Bowen Avenue, Chicago, Illinois; and that as such traffic manager it is his duty to, among other things, arrange and contract for, and order and supervise, the transportation of store fixtures and miscellaneous merchandise belonging to said Walgreen Co., and household goods of certain of said company's employes.

Affiant further deposes and says that Andrew G. Nelson, doing business as Nelson Warehouse & Express Co., having his principal office and place at 1119 East 42nd Street, Chicago, Illinois, is on this date, and has been continuously since the year A.D. 1919, under contract with said Walgreen Co., to transport by motor vehicle over various routes, between various municipalities, on various highways, store fixtures and miscellaneous merchandise, and household goods of employes, for Walgreen Co., in connection with the opening, closing and remodeling of stores, all over such state and federal highways within a radius of approximately six hundred (600) miles from Chicago, Illinois, as may be necessary to reach a Walgreen Co., drug store.

And further affiant saith not.

In witness whereof, affiant has hereunto attached his hand and seal, the 12 day of Nov., A.D. 1935.

s/ W. E. HENRY (SEAL)

Subscribed and sworn to before
me, a Notary Public in and for the
county of Cook and state of Illinois, this
12th day of November, A.D. 1935

s/ G. E. STEWART

(My commission expires Dec 3-1938)

[fol. 397] Exhibit C-1.

(Name of Board, etc.)	(Address)
Illinois Commerce Commission	Springfield, Illinois
Indiana Public Service Commission	Indianapolis, Indiana
Iowa Board of Railroad Commissioners	DesMoines, Iowa
Michigan Public Utilities Commission	Lansing, Michigan
Minnesota Railroad & Warehouse Commission	St. Paul, Minnesota
Missouri Public Service Commission	Jefferson City, Missouri
Nebraska State Railway Commission	Lincoln, Nebraska
The Public Utilities Commission of Ohio	Columbus, Ohio
Public Service Commission of Wisconsin	Madison, Wisconsin

[fol. 398] No. M. C. 1194

Andrew G. Nelson, Contract Carrier Operation

Before Supervisor John G. Petritz, at Chicago, Illinois, on November 9, 1936, personally appeared Andrew G. Nelson and made the following statements and representations:

1. That he is the applicant in M. C. 1194, and that his correct name is:

   Andrew G. Nelson

2. That his business address (since 1924) is:

   1119 East 42nd Street
   Chicago, Illinois

3. That he is an individual, doing business as:

   Nelson Warehouse & Express Co.

4. That on July 1, 1935, he owned and operated 8 trucks, and that he owns and operates the same number at the present time, (only three units, however, are used in contract interstate work, the balance of the equipment is used as follows:

   2 Dump trucks are used in applicant's coal business and 3 other trucks are used in applicant's local cartage business.

5. That he carries insurance on all his equipment, however, cargo insurance on the three units used in interstate contract hauling is carried by the Walgreen Company of Chicago. His P. D. and P. L. insurance is as follows:

   Property Damage—$5,000 limit.
   Public Liability—$10,000 and $50,000 limits.
   P. L. and P. D. is carried in General Accident and Assurance Company of Perth, Scotland, No A-858145—expires 1/1/37 J.G.P.

   That he has notified his insurance broker to have the proper in[illegible]ance certificates filed with the Commission at Washington prior to December 15, 1936.

6. That he has on file with the Commission at Washington a copy of his contract with Walgreen Company, as well as his schedule of minimum rates. (additional copy of each is attached hereto)

7. That he is an interstate contract carrier of property for the Walgreen Company and for it alone.

8. That he hauls to and from Walgreen Retail Stores located within 600 miles of Chicago. That said transportation has to do with the opening, the remodeling, and/or the closing of Walgreen retail stores, the commodities so transported are usually store fixtures and equipment and merchandise for the opening stock.

   That the household goods hauled are only for employees of the Walgreen Company and that payment for said transportation is taken care of by the Walgreen Company. This movement amounts to approximately ten trips per year.

That his equipment usually returns empty, except for old store fixtures and equipment and occasionally a transfer of stock for Walgreen Company.

That he has control over the three units which are used for Walgreen Company and that he believes himself to be a contract operator and not a lessor of equipment.

[fol. 399] 9. That he submitted the following to Supervisor Petritz for inspection as proof of operations:

(1) Certificate of Registration, No. 101065, under trucking code, dated Aug. 24, 1936. ← 1934

(2) Original contract between Walgreen Company and applicant, dated September 16, 1935—the one that is still in use and which a copy of is attached hereto. (Prior to 1935 applicant stated his contract with Walgreen was verbal)

(3) Wisconsin Inspector's Report dated Nov. 24, 1934 and Interim Receipt No. 10699 of same date.

(4) Copy of affidavit from Traffic Manager of Walgreen Company stating that applicant has continuously been doing interstate transportation for his company since 1919. (the original affidavit, applicant states, is on file with his application at Washington)

(5) Original Contract Carrier Permit from State of Wisconsin, No. I. C. 274 and dated August 2, 1934.

Original Contract Carrier Permit from State of Indiana, No. 351-B1, dated October 11, 1935.

Copy of Mileage Report to State of Minnesota for year of 1934 as well as registration card from Minnesota for year 1935.

(6) An assortment of delivery receipts (17) dated from June 27-1934 to Sept 21-1935 showing interstate contract movements for Walgreen Company in the following States, Illinois, Michigan, Indiana, Ohio, Kentucky, Missouri, Nebraska, Iowa, Minnesota and Wisconsin.

10. That his operations, except for frequency of service, have been the same for the past seventeen years.

11. That the foregoing statement of facts is true and correct to the best of my knowledge and belief.

s/ ANDREW G NELSON
Andrew G. Nelson

12. Dated at Chicago, Illinois, November 11, 1936.

[fol. 400]

COMMISSION'S EXHIBIT No. 2

Name ( ) Carrier Andrew G. Nelson, Inc
Address ( ) 3545 South Normal Avenue Chicago, Ill

Shipment No. Date of bill of lading 1953	TRANSPORTATION OF SHIPMENT		ACTUAL ROUTING	PROPERTY TRANSPORTED			TRANSPORTATION CHARGES RECEIVED BY CARRIER						OTHER RECORDS
	Consignor Origin	Consignee Destination	Transfer Points Connecting Line Carriers	Number of Units	Description of Article (And Method of Packing)	Weight (In lbs. except as noted)	Rate (In cents per 100 pounds except as noted)	Charge	Advances Other Charges	Total Charges	Prepaid or Col.	Record of Payment (Date & Method of Payment & Record of Entry)	
1 7-31	Blatz Brewing Co. Milwaukee, Wis	Beacon Distributors, Inc Chicago, Ill		1100	Cns of beer	32,538	24	78.09	Tx 2.34	80.43	Col.		Pro. No. C 03002
2 9-4	Linco Products Co. Chicago, Ill	Atlantic & Pacific Tea Co Evansville, Ind		585	Cases Bright Leaf, gls. ½ gals, gals	25,093	47	117.94	Tx 3.54	121.48	P.P		Pro. No. C 00924
3 9-4	Glaser Crandell Co. Chicago, Ill	Eagle Grocery Co Cleveland, Ohio		1768	cases pickles, preserves, jam jelly and table sauce in glass	27347	49	134.00 Stop off	10.00 Tx 4.32	148.32	P.P		Pro. No. C 00911
[illegible] 9-9	Certified Products Chicago, Ill	Associated Grocers Inc Springfield, Mo		1555	Cases Cherries cracker jack preserves & jellies	29,465	76	227.74	Tx 6.83	234.57	P.P		Pro. No. C 00917
5 9-10	Loyal Packing Co. Chicago, Ill	[illegible] Grocery Co. St Louis, Mo		705	Cases canned meat in tin & glass	20115 as 22004	43	94.60	Tx 2.84	97.44	P.P		Pro. No. C 00919
6 9-15	M. K. Goetz Brewing Co St. Joseph, Mo.	Gateway Liquor Co. Green Bay, Wis.		1250	Cases malt liquor	31,563	73	230.41 Stop off	10.00 Tx 7.21	247.62	Col.		Pro. No. C 00950
7. 9-18	Dairypak Inc. Cleveland, Ohio	Johnson Milk Co. Detroit, Mich		728	pkgs fibreboard boxes KD flat or folded flat	26,837	32	85.88	Tx 2.58	88.46	P.P		Pro. No. C 00960
8. 9-[illegible]2	CVA. Corp. Chicago, Ill	Hamilton Supply Co Madison, Wis		620	Cases wines	22510	43	96.79	Tx 2.90.	99.69	Col.		Pro. No. C 00966
9 9-22	Manhattan Pickle Co. Chicago, Ill	Pesta Foods Pick N Pay, Bartly Co Cleveland Toledo, Ohio		802	Cases shrimp, oysters, dill pickles, wine flavored dill pickles	21,510	49	105.40 Stop off	20.00 Tx 3.76	129.16	P.P		Pro. No. C 00962

Ex 24 ICC

Carrier Andrew G. Nelson, Inc.

Shipment No. Date of bill of lading 1953	TRANSPORTATION OF SHIPMENT: Consignor Origin	Consignee Destination	ACTUAL ROUTING: Transfer Points Connecting Line Carriers	PROPERTY TRANSPORTED: Number of Units	Description of Article (And Method of Packing)	Weight (In lbs. except as noted)	TRANSPORTATION CHARGES RECEIVED BY CARRIER: Rate (In cents per 100 pounds except as noted)	Charge	Advances Other Charges	Total Charges	Prepaid or Col.	Record of Payment (Date & Method of Payment & Record of Entry)	OTHER RECORDS
10 9-22	Manhattan Pickle Co. Chicago, Ill	J.P. Schaffer Grocery Co. Portsmouth, Ohio		700	cs. wine flavored, Fair Home Kosher, dills	21,000 as 22,000	52	114.40 Stop off Tx	10.00 3.72	128.13	P.P.		Pro. No. C 00967
11 10-2	" " " "	Foodtown Purchasing Corp. Cleveland, Ohio		704	cs. wine flavored dill pickles	21,120 as 22,000	49	107.80 Tx	3.23	111.03	P.P.		Pro. No. C 01266
12 10-5	Economics Lab. Chicago, Ill	Tradey Faneuil Whse. Co. Cleveland, Ohio		582	drums cases Super S&F, Pan Dandy, Soilmaster, Electrasol, Fin	30,698	49	150.42 Tx	4.51	154.93	P.P.		Pro. No. C 01270
1[illegible] 10-5	Certified Products Chicago, Ill.	Grand Rapids Wholesale Grocers Grand Rapids, Mich.		1260	boxes preserves	20,160 as 22,000	32	70.40 Tx	2.11	72.51	P.P.		Pro. No. C 01275
14 10-8	M & R Dietetic Lab. Sturgis, Mich.	M & R Dietetic Laboratory Chicago, Ill		2200	Ctns Cream in tins, similar liquid in tins	30,000	30	90.00 Stop off Tx	10.00 3.00	103.00	P.P.		Pro. No. C 01295
15 10-13	Certified Products Chicago, Ill	Grand Rapids Wholesale Grocery Grand Rapids Mich		2054	Cases jelly, cherries, ctns of marshmallows	29,529	32 55	117.60 Tx	3.52	121.12	P.P.		Pro. No. C 01310
16 10-14	Armour & Co. Chicago, Ill	A & P Tea Co. Kroger Company Cincinnati Woodlawn, Ohio		805	cases canned meats, w/Veg	20,170 as 22,000	43	Stop off 94.60 Tx	10.00 3.14	107.74	P.P.		Pro. No. C 03027
17 10[illegible]5	" " " "	The Gummed Products Co. Troy, Ohio		220	bags dry glue	22,220	57	126.65 Tx	3.80	130.45	P.P.		Pro. No. C 03028
18 10-21	Puritan Company Chicago, Ill	C.L. Kangeser Food Town Purch. Corp Youngstown Cleveland, Ohio		921	Cases citrus juice, preserved fruit, prune juice, fig juice in glass	26,865	52	139.70 Stop off Tx	10.00 4.49	154.19	P.P.		Pro. No. C 01342

rier Andrew G. Nelson, Inc
Chicago, Ill

ip- ment No. Date of bill of lading 1953	TRANSPORTATION OF SHIPMENT Consignor Origin	 Consignee Destination	ACTUAL ROUTING Transfer Points Connecting Line Carriers	PROPERTY TRANSPORTED Number of Units	 Description of Article (And Method of Packing)	 Weight (In lbs. except as noted)	TRANSPORTATION CHARGES RECEIVED BY CARRIER Rate (In cents per 100 pounds except as noted)	 Charge	 Advances Other Charges	 Total Charges	 Pre-paid or Col.	 Record of Payment (Date & Method of Payment & Record of Entry)	OTHER RECORDS
28 11-3	Certified Products Co. Chicago, Ill	Grand Rapids Whsl. Grocers Co Grand Rapids, Mich		1187	cases salad dressing, cherries, wash ammonia, preserves & jellies, marshmallows	23,195	32 55	85.82 Tx	2.57	88.39	P.P.		Pro. No. C 01388
29 11-3	Armour & Co Chicago, Ill	Armour & Co Detroit, Mich		755	cases canned meats (Dog Food)	28,340	39	110.53 Tx	3.32	113.85	P.P		Pro. No. C 01383
30 11-6	Olds Products Co. Chicago, Ill	Smith & Swinton Bartley Co. Cleveland, Toledo, Ohio		1140	boxes prepared mustard	33,955	49	166.38 Stop off Tx	10.00 5.29	181.67	P.P		Pro. No. C 01403
3[illegible] 11-6	Runkle Company Kenton, Ohio	Welch Nut & Candy Company Chicago, Ill		1900	cartons candy mixed	24,700	64	158.08 Tx	4.74	162.82	P.P.		Pro. No. C 01405
32 11-12	The Runkle Co Kenton, Ohio	The Runkle Co Lexington, Ky		968	cartons candy	23,980	60	143.88 Tx	4.32	148.20	Col.		Pro. No. C 01434
33 11-13	Chicago Food Mfrs Pool Car Group Chicago, Ill.	Abner Wolfe, Inc, Detroit, Mich		877	Cases salad mustard, horse rad mustard	21,601 as 22,000	39	85.80 Tax	2.57	88.37	P.P		Pro. No. C 01424
34 11-13	Topco Associates Inc Green Bay, Wis	Piggly Wiggly Midwest Co Rockford, Ill		680	cs wax beans food club green beans	21,080 as 22,000	35	77.00 Pick up Tx	10.00 2.61	89.61	P.P		Pro. No. C 01429
35 11-[illegible]	Topco Associates Inc Oakfield, Wis	Piggly Wiggly Rockford, Ill		1200	Cases canned pumpkin, peas and carrots	36,300	31	112.53 Pick up Tx	10.00 3.68	126.21	P.P		Pro. No. C 01438
36 11-23	Montgomery Ward & Co Chicago Heights, Ill	Montgomery Ward & Co Detroit Dearborn, Mich		189	ctns batteries elec. stge, wet with chemicals	12,300	50	61.50 Stop off Tx	5.00 2.00	68.50	Col.		Pro. No. C 03079

Chicago, Ill

ipment No. Date of bill of lading 1953	TRANSPORTATION OF SHIPMENT Consignor Origin	 Consignee Destination	ACTUAL ROUTING Transfer Points Connecting Line Carriers	PROPERTY TRANSPORTED Number of Units	 Description of Article (And Method of Packing)	 Weight (In lbs. except as noted)	TRANSPORTATION CHARGES RECEIVED BY CARRIER Rate (In cents per 100 pounds except as noted)	 Charge	 Advances Other Charges	 Total Charges	 Prepaid or Col.	 Record of Payment (Date & Method of Payment & Record of Entry)	OTHER RECORDS
19 10-21	Morton Mfg Co Libertyville Ill	Morley Murphy Co. Green Bay Wis		1	T/L of 119 cabinets or lockers storage wardrobe or kitchen NOI	110 cu ft	not shown	163.01 Stop off Tax	10.00 5.19	178.20	Col		Pro. No. C 01343
20 10-23	Runkle Company Kenton, Ohio	Welch Nut & Candy Co Chicago, Ill		1052	ctns candy	22,950	64	146.88 Tx	4.41	151.29	Col		Pro. No. C 01348
21 10-26	Algona Co-op Creamery Co Algona, Iowa	Dairy Belle Foods Inc Chicago, Ill		250	bags non fat-ning dry milk (soiled)	25,000	69	172.50 2 stops	20.00 Tx 5.77	198.27	Col		Pro. No. C 03038
[illegible] 10-28	Gold Seal Co Chicago, Ill	Colonial Warehouses, Inc N Minneapolis, Minn		1612	cases snowy bleach	34,272	54	185.07 Tx	5.55	190.62	P.P.		Pro. No. C 01362
23 10-29	Chicago Food Mfrs Pool Car Group Chicago, Ill	Benner Tea Co Burlington, Ia		1348	Cases Trumf jelly, salad mustard in glass	30,580	38	116.20 Tx	3.49	[illegible]	P.P.		Pro. No. C 03043
24 10-29	Gold Seal Co Chicago, Ill	Grand Trunk & Cold Storage Co Detroit, Mich		1248	cases Snowy NOIBN (cleaning and Washing Comp)	29,952	39	[illegible]6.81 Tx	3.50	120.31	P.P.		Pro. No. C 01368
25 10-30	Chicago Food Mfrs Pool Car Group Chicago, Ill	Edgars Whsl Symon Bros Detroit Jackson, Mich		1152	cs mustard, canned meats, prune juice, syrup, pickles in glass	34,281	39	133.70 2 stops Tx	20.00 4.61	158.31	P.P.		Pro. No. C 01371
26 10-[illegible]8	CVC Corp Chicago, Ill	Gateway Liquor Co Green Bay, Wis		545	cases wines	20,205	50	101.03 Tx	3.03	104.06	Col.		Pro. No. C 01372
27 11-3	Wyeth Laboratory Mason, Mich	Wyeth Labs Cleveland, Ohio		1127	ctns milk food O/T malted milk powder, food prepared	30,733	37	113.71 Tx	3.41	117.12	P.P.		Pro. No. C 01406

arrier Andrew G. Nelson, Inc.
Chicago, Ill

[fol. 404]

p- nt No. Date of bill of lading	TRANSPORTATION OF SHIPMENT Consignor Origin	Consignee Destination	ACTUAL ROUTING Transfer Points Connecting Line Carriers	Number of Units	PROPERTY TRANSPORTED Description of Article (And Method of Packing)	Weight (In lbs. except as noted)	TRANSPORTATION CHARGES RECEIVED BY CARRIER Rate (In cents per 100 pounds except as noted)	Charge	Advances Other Charges	Total Charges	Prepaid or Col.	Record of Payment (Date & Method of Payment & Record of Entry)	OTHER RECORDS
1953 37	Armour & Co	Abner Wolf		815	cases canned meats w/veg dog food	29,610	39	115.09 Stop off	10.00 Tx 3.75	128.84	P.P.		Pro. No. A 01462
11-24	Chicago, Ill	Detroit, Mich											
38	The Runkle Co	Wolch Nut & Candy Co.		1871	cartons candy	24,325	64	156.00	Tx 4.68	160.68	Col.		Pro. No. A 01468
11-24	Kenton, Ohio	Chicago, Ill											
39	Illinois Meat Co.	Grand Rapids Whse. Grocery		784	cases canned meats	20,036 as 22,000	32	70.40	Tx 2.11	72.51	P.P.		Pro. No. A 01466
11-24	Chicago, Ill	Grand Rapids Mich.											
4	Armour & Co	Keuhman Potato Chip Co.		50	drums lard sub. (Kremax)	21,353 as 22,000	48	105.60	Tx 3.17	108.77	P.P.		Pro. No. A 01475
11-25	Chicago, Ill	Toledo, Ohio											
41	Illinois Meat Co.	Abner Wolf Inc.		895	cases canned meat	20,005 as 22,000	39	85.80	Tx 2.57	88.37	P.P.		Pro. No. A 01480
11-27	Chicago, Ill	Detroit, Mich											
42	Gold Seal Co.	National Terminal Corp		975	cases Snowy Combo	30,225	49	148.10	Tx 4.44	152.54	P.P.		Pro. No. A 01486
11-30	Chicago, Ill	Cleveland Ohio											
43	Armour & Co.	The A & P Tea Co.		360	cases canned hams	19,845 as 22,000	39	85.80	Tx 2.57	88.37	P.P.		Pro. No. A 01489
11-30	Chicago, Ill	Detroit, Mich											
44	Puritan Co	C L Kangesser		1011	Cases citrus juice olives, preserved fruit, prune juice, in glass	27,052	49	132.55	Tx 3.98	136.53	P.P.		Pro. No. A 01491
1[illegible]1	Chicago, Ill	Cleveland, Ohio											
45	Armour & Co.	A & P Bakery		56	drums lard sub	23,986	50	119.93	Tx 3.60	123.53	P.P.		Pro. No. A 01492
12-1	Chicago, Ill	Detroit, Mich											

ier Andrew G. Nelson, Inc,
Chicago, Ill.

nt o. Date of bill of lading 1953	TRANSPORTATION OF SHIPMENT		ACTUAL ROUTING	PROPERTY TRANSPORTED			TRANSPORTATION CHARGES RECEIVED BY CARRIER						OTHER RECORDS
	Consignor Origin	Consignee Destination	Transfer Points Connecting Line Carriers	Number of Units	Description of Article (And Method of Packing)	Weight (In lbs. except as noted)	Rate (In cents per 100 pounds except as noted)	Charge	Advances Other Charges	Total Charges	Prepaid or Col.	Record of Payment (Date & Method of Payment & Record of Entry)	
46 12-1	Certified Products Co. Chicago Ill.	Grand Rapids Wholesale Grocers Grand Rapids, Mich		725	cases preserves, ammonia	22,000	32	70.40 Pick up Tx	10.00 2.41	82.81	P.P.		Pro. No. G 01494
47 12-2	Illinois Meat Co. Chicago, Ill.	National Food Stores A. W. Walsh Co Kalamazoo, Mich		980	Cases canned meats	25,195	30	75.59 Stop off Tx	10.00 2.57	88.16	P.P.		Pro. No. G 01508
48 12-2	Mogen David Wine Corp Chicago, Ill.	Wasserstrom Wine & Import Columbus, Ohio		600 1	pkgs wine " Adv. material	26,500	60	159.00 Tx	4.77	163.77	P.P		Pro. No. G 03076
4[illegible] 12-3	Walsch Nut & Candy Co. Chicago, Ill.	Runkle Candy Co Kenton, Ohio		243 85	bundles circus peanuts, shipping cases corrugated pails @ 100 each	22,000	39	85.80 Tx	2.57	88.37	P.P		Pro. No. G 03078
50 12-7	Puritan Company Chicago, Ill.	J. Mrt Robb A & P Tea Co Columbus, Ohio		875	Cases citrus juice in glass, tins, olives Realemon, Orange aide	25,447	45	114.51 Stop off Tx	10.00 3.74	128.25	P.P.		Pro. No. G 03084
51 11-16	Wyeth Laboratory Skokie, Ill.	Wyeth Labs Cleveland, Ohio		1191	Cartons drugs and medecine NOI	30363	63	191.29 Tx	5.74	197.03	P.P.		Pro. No. G 01430

[fol. 406] COMMISSION'S EXHIBIT No. 3

PHONE KENWOOD 8-2300

ANDREW G. NELSON, INC.
3545 SOUTH NORMAL AVENUE
CHICAGO 9, ILLINOIS

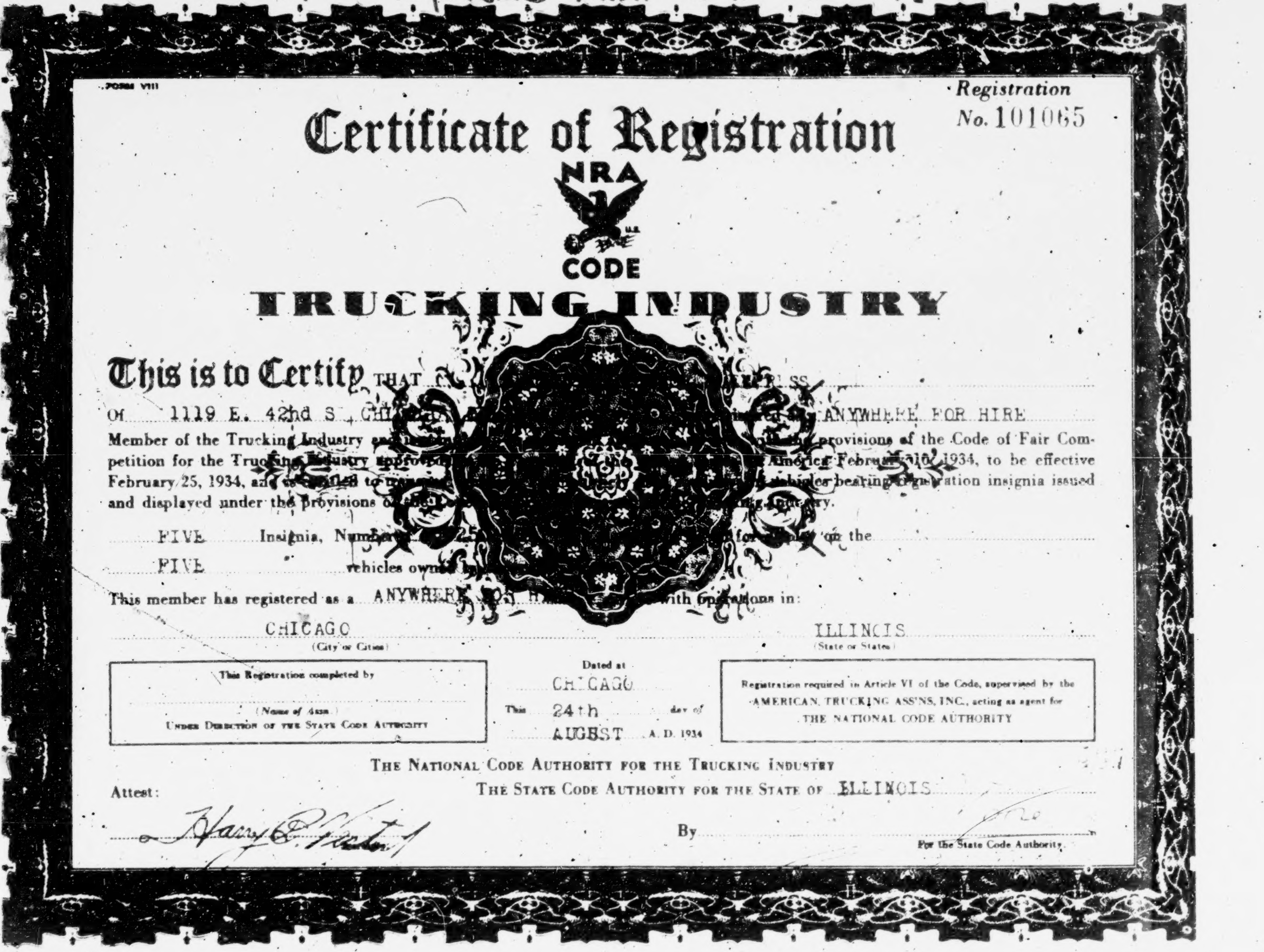
CONTRACT CARRIER
SERVING, ILLINOIS-INDIANA
KENTUCKY-MICHIGAN-MINNESOTA
NEBRASKA-OHIO-WISCONSIN
IOWA-MISSOURI

Dec. 14, 1953

Shipper	Number of shipments	Date of contract	Commodities handled, manufactured, or distributed
Armour & Co	96	Sept 8, 1953	Packing house prod.
Abbott Laboratories	2	Oct. 15, 1953	Drugs
Chicago Copper & Chemical Co		June 15, 1951	Chemicals
Chicago Food Mfgr's Pool Car Group	10	July 21, 1953	canned goods
Chicago O-SoGrape Bottling Works		July 6th 1953	soft drinks
The Climalene Co	54	July 28, 1953	soaps & cleansers
Continental Soap Co		Jan 27, 1953	soap
Dairy Belle Food Inc	2	Oct. 23, 1953	milk sugars
Food & Allied Shippers & Receivers Ass'n		July 13, 1953	shippers goods
Dairypak Inc	9	Sept. 16, 1953	fibreboard boxes
Economics Laboratory Inc	29	July 22, 1953	soaps, cleansers
Gateco Liquor Inc	3	Oct. 19, 1953	liquor
Gateway Corpn d/b/a/ Gateway Valley Co	1	June 4, 1953	"
Glaser Crandell Co	1	July 15, 1953	canned goods
Gateway Liquor Co. Inc	2	June 4, 1953	liquor
Globe Union Inc		Dec. 9, 1953	stge. batteries, skates
Gold Seal Co	11	Oct. 7, 1953	window cleaner
Hamilton Supply Co	3	May 28, 1953	liquor
Humiston, Keeling Co		Jan. 28, 1953	drugs
Illinois Meat Co	4	Nov. 23, 1953	packing house prods.
Linco Pro. Distributing Co	1	Apr. 24, 1951	soaps, bleaches
Loyal Packing Co	1	Sept. 8, 1953	canned goods
Manhattan Pickle Co	3	Sept. 21, 1953	" "
Michigan Pickle Co		Apr. 22, 1952	" "
Miles Laboratory Inc		Jan. 29, 1952	drugs
M & R Dietetic Laboratories Inc	40	Dec. 31, 1952	dietetic foods
Metro R. K. Inc		July 22, 1953	wine

Shipper	Number of shipments	Date of contract	Commodities handled, manufactured, or distributed
Min Sun Trading Co		Aug. 10, 1953	canned goods
The Muir Company		Jan. 23, 1952	drugs
Nash-Underwood Inc		July 15, 1953	food
The Olds Products Co	2	Aug. 25, 1953	"
Peck Drug Stores		Nov. 21, 1951	drugs
John Puhl Products Co		July 31, 1953	cleaning compounds
Puritan Corporation	36	May 13, 1952	food specialties
Rexall Drug Co		Mar. 6, 1952	drugs
The Runkle Co	6	Nov. 20, 1953	candy
Topco Associates Inc	2	Oct. 30, 1953	canned goods
E-L-Wholesale Liquor Co		Aug. 20, 1953	liquor
Wolch Nut & Candy Co		Sept. 25, 1953	candy
Wyeth Inc	2	June 5, 1952	drugs
The Upjohn Co		Mar. 27, 1952	"
Julius Wasserstrom d/b/a/ Wasserstrom Wine & Import Co	8	Mar. 16, 1953	wine
Wyeth Lab. Div. of Am Home Products Co	85	Mar. 2, 1953	drugs, food preps
Montgomery Ward & Co.	2	Nov. 20, 1953	gen. merchandise
Certified Products Co.	14	April 21, 1953	canned goods
Morton Mfg. Co.	1	Oct. 21, 1953	store fixtures
Total shipments—	430		

[Fol. 407 Respondent's Exhibit No. 4. (P. 229)]



FORM VIII

Registration
No. 101065

Certificate of Registration

NRA
CODE

TRUCKING INDUSTRY

This is to Certify THAT [illegible] EXPRESS

Of 1119 E. 42nd S , CHI[illegible] ANYWHERE FOR HIRE

Member of the Trucking Industry [illegible] provisions of the Code of Fair Competition for the Trucking Industry approved [illegible] America February 10, 1934, to be effective February 25, 1934, and is entitled to [illegible] vehicles bearing registration insignia issued and displayed under the provisions of the [illegible] Industry.

FIVE Insignia, Numbered [illegible] 25[illegible] for display on the

FIVE vehicles owned by [illegible]

This member has registered as a ANYWHERE FOR H[illegible] with operations in:

CHICAGO (City or Cities)

ILLINOIS (State or States)

This Registration completed by	Dated at CHICAGO This 24th day of AUGUST A. D. 1934	Registration required in Article VI of the Code, supervised by the AMERICAN TRUCKING ASS'NS, INC., acting as agent for THE NATIONAL CODE AUTHORITY
(Name of Assn.) UNDER DIRECTION OF THE STATE CODE AUTHORITY		

THE NATIONAL CODE AUTHORITY FOR THE TRUCKING INDUSTRY

THE STATE CODE AUTHORITY FOR THE STATE OF ILLINOIS

Attest:

Harry C. Peeter[illegible]

By

For the State Code Authority.

[fol. 408] RESPONDENT'S EXHIBIT No. 5

ORDER

At a Session of the INTERSTATE COMMERCE COMMISSION, Division 5, held at its office in Washington, D. C., on the 14th day of February, A. D. 1938

No. MC 1194

APPLICATION OF ANDREW G. NELSON, DOING BUSINESS AS NELSON WAREHOUSE AND EXPRESS CO., CHICAGO, ILLINOIS

After due investigation:

It appearing, That applicant in accordance with the requirements of Section 209, Motor Carrier Act, 1935, including due service, made application for a permit to operate as a contract carrier by motor vehicle according to the specification *set forth as appended on the reverse side hereof or attached hereto,* and made a part of this order, and that the said applicant or predecessor in interest was in bona fide operation in such manner on July 1, 1935, and has so operated since that time; and the Commission so finding; therefore

It is ordered, That upon full compliance with the requirements of Sections 215 and 218 of the said Act, and the rules and regulations prescribed by the Commission thereunder, *governing the filing of contract carrier rate publications and filing and approval of evidence of security for the protection of the public, and with the requirements established in Contracts of Contract Carriers,* 1 M.C.C. 628, a permit shall be issued, unless otherwise ordered, authorizing said applicant to engage in interstate or foreign commerce, as a contract carrier by motor vehicle according to the specification *set forth as appended on the reverse side hereof or attached hereto,* and made a part of this order.

It is further ordered, That in all other respects the said application shall be, and it is hereby, denied, *and that on and after 30 days from date of this order,* unless on the Commission's own motion or for good cause shown it is otherwise ordered, applicant shall not engage in any motor carrier operations not described herein or otherwise lawfully authorized.

It is further ordered, That in the event said applicant has not complied with the requirements herein *within 30 days from date of this order*, then said applicant shall show cause, if any there be, *within 60 days from the date of this order*, why said application should not be dismissed, failing in which the said application shall be dismissed without further proceedings.

And it is further ordered, That if applicant or any other party in interest desires to protest the issuance of such permit, such applicant or party in interest shall file with the Commission *within 30 days from the date of this order*, a petition setting forth the grounds relied upon in opposing the granting of such authority and requesting that the issuance of the said permit be withheld pending further investigation and order by the Commission. Otherwise such protests shall be denied.

By the Commission, division 5.

W. P. Bartel,
Secretary.

(seal.)

[fol. 408a] Appendix to the order of the

Interstate Commerce Commission, Division 5 dated the

14th day of February, A. D. 1938

No. MC 1194

APPLICATION OF ANDREW G. NELSON, DOING BUSINESS AS NELSON WAREHOUSE AND EXPRESS CO., CHICAGO, ILLINOIS

The business of applicant, as authorized by the order of which this is a part, in interstate or foreign commerce as a contract carrier by motor vehicle of the commodities indicated, over irregular routes, is as specified below:

New and used store fixtures, new and used household goods, and *stock* in trade of drug stores,

Between points and places in Illinois, Indiana, Iowa, Kentucky, Michigan, Minnesota, Missouri, Nebraska, Ohio, and Wisconsin.

[fol. 410] RESPONDENT'S EXHIBIT No. 7

PERMIT P30.1

No. MC 3194

ANDREW G. NELSON,
DOING BUSINESS AS NELSON WAREHOUSE & EXPRESS CO.,
CHICAGO, ILLINOIS

At a Session of the INTERSTATE COMMERCE COMMISSION, Division 5, held at its office in Washington, D. C., on the 13th day of March, A. D. 1942

AFTER DUE INVESTIGATION, It appearing that the above-named carrier has complied with all applicable provisions of the Interstate Commerce Act, and the requirements, rules, and regulations prescribed thereunder, and, therefore, is entitled to receive authority from this Commission to engage in transportation in interstate or foreign commerce as a motor carrier; and the Commission so finding;

IT IS ORDERED, That the said carrier be, and it is hereby, granted this Permit as evidence of the authority of the holder to engage in transportation in interstate or foreign commerce as a contract carrier by motor vehicle; subject, however, to such terms, conditions, and limitations as are now, or may hereafter be, attached to the exercise of the privileges herein granted to the said carrier.

IT IS FURTHER ORDERED, That the transportation service to be performed by the said carrier in interstate or foreign commerce shall be as specified below:

New and used store fixtures, new and used household goods, and *stock* in trade of drug stores, over irregular routes,

Between points and places in Illinois, Indiana, Iowa, Kentucky, Michigan, Minnesota, Missouri, Nebraska, Ohio, and Wisconsin.

AND IT IS FURTHER ORDERED, That this permit shall be effective from the date hereof and shall remain in effect until suspended, changed, or revoked as provided in said Act.

By the Commission, division 5.

W. P. Bartel,
Secretary.

(SEAL.)

[fol. 411] RESPONDENT'S EXHIBIT No. 8

Before the Interstate Commerce Commission
Andrew G. Nelson, Inc., Investigation of operations,
Docket MC-C-1610

Copy of Page 7, Household goods carriers Bureau Tariff No. 38, MF-I.C.C. No. 46; MP-I.C.C. No. 7 .. 6

Exhibit No. ....

Witness ....

SECTION I

Carriers listed in this section participate in this Tariff, also in the following tariffs:

Tariff No. 35-A, Household Goods Carriers' Bureau, Agent, MF-I.C.C. No. 43, and supplements thereto (see notes).

Mileage Guide No. 4, Household Goods Carriers', Bureau, Agent, MF-I.C.C. No. 27, and supplements thereto or successive reissues thereof. (For additional participants in Mileage Guide, see Sections II, III, and IV.)

NOTE 1: The participation of each carrier named in this section is limited to the transportation of Household Goods, (see NOTE 2), to, from or between the points, places or territories as specifically provided in this section in connection with each carrier as to local traffic, and is subject to the same limitation on traffic originating at or destined to points located on the routes of other carriers, except as otherwise specifically provided.

NOTE 2: Defined by the Interstate Commerce Commission in 17 M.C.C. No. 467 as follows:

> "The term 'household goods' means personal effects and property used or to be used in a dwelling when a part of the equipment or supply of such dwelling; furniture, fixtures, equipment and the *property* of stores, offices, museums, institutions, hospitals, *or other establishments* when a part of the *stock*, equipment, or supply of such stores, *offices, museums, institutions, hospitals, or other establishments;* and articles including objects of art, displays, and exhibits, which because of their unusual nature or value require specialized handling and equipment usually employed in moving household goods."

[fol. 442] M-7775

INTERSTATE COMMERCE COMMISSION

No. MC-C-1610

ANDREW G. NELSON, INC.—INVESTIGATION OF OPERATIONS

Submitted December 13, 1954. Decided March 17, 1955

Respondent found to be engaged in transportation not authorized by its permit and not to be in compliance with the requirements of section 209 (a) of the Interstate Commerce Act. Cease and desist order entered.

Paul E. Blanchard and *Milton E. Diehl* for respondent.

James A. Murray, Hugh E. Lillie, James Y. Piper, and *Thomas J. Delaney* for Bureau of Inquiry and Compliance, Interstate Commerce Commission.

Eugene L. Cohn, Bernard G. Collin, Ovid Crouch, Claude G. Metzler, Joseph M. Scanlon, Carl L. Steiner, and *Glenn W. Stephens* for interveners in support of the investigation.

REPORT OF THE COMMISSION

DIVISION 5, COMMISSIONERS CROSS, TUGGLE, AND HUTCHINSON

BY DIVISION 5:

Exceptions were filed by respondent to the order recommended by the examiner, and certain interveners and the Bureau of Inquiry and Compliance, Interstate Commerce Commission, hereinafter referred to as the Bureau, replied.

Respondent's exceptions are nine in number. It excepts: (1) to the alleged fragmentary and incomplete statements of fact in the report of the examiner, specifically as regards those historical facts relating to the original "grandfather" application and the so-called "compliance order" which constituted a step in the informal processing of the application of respondent's predecessor-in-interest culminating in the issuance of the assailed permit; this exception is premised on a conclusion that the terms of the permit are ambiguous; (2) to the examiner's statement of the issue to be "a determination of the extent of the authority granted by the commodity description '*stock* in trade of drugstores'," it being respondent's position that the sole issue relates to whether the permit contains a so-called "Keystone" restriction, limiting the persons whom respondent may serve to a certain class of shippers; (3) to the alleged inconsistency between the examiner's finding that "*stock* in trade of drugstores" relates to stock kept for sale purposes by one who operates a drugstore, and the [fol. 443] position of the Bureau that the intended use test is applicable here, it being respondent's contention that if the examiner's interpretation is correct the permit would allow only the movement from one shelf to another in the same store rather than a movement which is unrestricted so long as it is earmarked for eventual delivery to, and sale in, a drug-store as the Bureau urges, (4) to the examiner's refusal to accept respondent's interpretation of the term "*Stock* in trade of drugstores" as meaning "commodities described as stock in trade of drugstores," it being respondent's contention that such refusal is equally critical of the previously noted compliance order, entered herein; respondent argues that the 'compliance order' must be examined to determine whether or not the permit effectuates that order; (5) to the examiner's selection of the particular dictionary definitions of the word "of," in his interpretation of the term "stock in trade *of* drugstores," claiming that his choice is designed to suit the objective of the Bureau; it argues that there are many other definitions of the word "of" which make equally as much sense as the one adopted by the examiner connoting possession and ownership, (6) to the examiner's alleged failure to point out that this permit was issued subsequent to the determination by this Commission that a permit may be restricted to a certain class of shippers, in the face of which the permit in question was not so limited, it being argued that the "Keystone" restriction could have been inserted in the permit but was not, and cannot now be read into the authority; it urges further that the Commission abandoned the intended use test in the report in *Vidas Contract Carrier Application*, 62 M. C. C. 106, which decision, it alleges, is controlling here; (7) to the alleged failure of the examiner to point out that respondent's permit embraces authority to transport "new and used household goods," the scope of which has already been spelled out and defined by the Commission, and that under such definition respondent has authority to transport almost every article, from every consignor to every consignee, named in the investigation order, regardless of the scope of consignee or consignor coverage included in the term "*stock* in trade of drugstores." It is respondent's position that the Commission's definition of "household goods" in *Practices of Motor Common Carriers of Household Goods*, 17 M. C. C. 467 authorizes it to transport "*property of stores* * * * when *part of the stock, equipment or supply* of such stores * * *," without restriction of any kind; (8) to the inclusion in the report of the discussion of our power to revoke a permit and the procedure by which such action is to be accomplished, it being contended that such discussion has no relevancy here; and (9) to the examiner's reference to the number of opposing motor carriers and associations thereof, and rail carriers, charging this was an attempt unduly to [fol. 444] inflate the degree of opposition to respondent; it claims that much of the opposition was "nominal" and that relatively few motor carriers were serious in their support of the Bureau.

In reply certain interveners support the findings and conclusions of the examiner, except that they would place an even more limited interpretation on the term "stock in trade." They urge now, as they did at the hearing, that under trade usage and practice, such term does not include all commodities that a drug store may have for sale purposes. In particular they would exclude such commodities as storage batteries, cabinets, lockers, canned vegetables, pickles, and similar articles, which they assert are known in the trade as "drug sundries" rather than "stock in trade." The Bureau and certain other interveners support the findings and conclusions of the examiner and urge that they be sustained.

We agree with the contention of the parties and the examiner's conclusion that there is no such patent ambiguity in the permit as to warrant our going back of it and giving consideration to events prior to its issuance. This obviates the necessity for consideration of respondent's first and fourth exceptions which are premised on such events.

As to the second and seventh exceptions, we are of the opinion that the examiner's statement and discussion of the issue is sound as regards the phrase "*stock* in trade of drugstores." Involved also, however, is a determination of the extent of authority granted by the terms "*new and used store fixtures*" and "*new and used household goods.*" It appears that the examiner's omission of a statement regarding these terms stems from the fact that at the hearing respondent did not appear seriously to contend that such terms authorized it to conduct the operations to which the investigation order made reference. Even on exceptions no question is raised as to the meaning of the term "*new and used store fixtures*", which is adequately defined in *Shelinsky Common Carrier Application*, 52 M. C. C. 349, at 359, where division 5 said: "In our opinion, a motor carrier authorized to transport 'store fixtures' is limited to such items as showcases, counters, tables, floor cabinets, wall cases and other items of similar utility." and in *Mural Trucking Service Interpretation of Certificate*, 63 M. C. C. 47, where, in interpreting the term "store fixtures and store equipment," division 5 stated:

> Petitioners' operations, although not actually limited to the transportation of shipments moving to stores * * *, are, nevertheless, strictly limited to the transportation of commodities which at the time of the transportation are intended for such use.

Respondent's contention with respect to the meaning of "household goods" is totally without merit. Any article which is a part of the stock in trade of a mercantile establishment does not for that reason come within the meaning ~~[fol. 445]~~ of "household goods," except as an incident of the movement of such establishment from one location to another. See *Barnett Extension of Operations—Furniture*, 44 M. C. C. 587, *Shapiro Extension—Shuffleboards*, 49 M. C. C. 634, and *North American Van Lines, Inc., Extension—New Furniture*, 49 M. C. C. 368.

As to the third exception, we do not agree that an inconsistency exists between the intended use test and the examiner's statement that "*stock* in trade of drugstores" means stock kept for sale purposes by one who operates a drugstore. The definition is valid and points, in our opinion, to the obvious equivalent of the description in the permit, which is "drugstores' *stock* in trade," as the examiner concluded. The important determination here, as in all such inquiries, is what transportation was intended to be authorized by this language of the permit. In *C & H Transp. Co. Inc., Interpretation of Certificate*, 62 M. C. C. 586, division concluded that authority to transport "contractors' equipment and supplies" authorizes the transportation of all forms of equipment and supplies which are at the time of movement intended for use by a contractor, and further that when the controlling use is established, the commodity may be transported for or to anyone, and the identity of the shipper or consignee is not important except as it may tend to establish or confirm the intended use. The similarity between the phrase there interpreted and "*stock* in trade of drugstores" or its equivalent, "drugstores' *stock* in trade," is readily apparent, and no good reason has been advanced for a conclusion here, different from that in the case just cited.

The fifth exception raises no question not disposed of in our discussion of the third and need not be further considered.

The sixth, eighth, and ninth exceptions are without merit. As to the sixth, no attempt has been made to read into respondent's permit a "Keystone" restriction. The commodity limitation in its permit does not limit the class or type of persons with whom it may contract as would a "Keystone" restriction. Further, respondent's argument that the intended use test has been abandoned by the Commission is fallacious. True it was found inapplicable in the *Vidas* case, *supra*, but it remains valid and has been found applicable in proceedings more recent than the *Vidas* case. See *C & H Transp. Co. Inc., supra*, and *Mural Trucking Service Interpretation of Certificates, supra*. As to the eighth exception, respondent, itself, in its brief raised certain questions as to the procedure by which a permit might be revoked, and in his report the examiner clarified the matter. Moreover, the order instituting this investigation specified that this action was taken under sections 204 (c) and 212 (a) of the Interstate Commerce Act, the latter section dealing, among other things, with our power to revoke or suspend operating authorities. As [fol. 446] to the ninth, suffice it to point out that the examiner correctly indicated the support of interveners which the Bureau has in this proceeding, and that of the "nominal" opposition to which respondent refers, briefs and replies to respondent's exceptions herein were filed on behalf of 17 motor carriers and an association of motor carriers.

We are unable to agree with the contention of certain interveners that "stock in trade" has a more limited meaning than that advanced by the examiner, although we do agree that cognizance of trade usages may be taken in determining proper construction of terms used in authorities. In any event it is of no moment in the instant proceeding as the conclusion does not depend on such determination.

We have given full consideration to respondent's exceptions and the replies thereto and find that except as modified herein the examiner has adequately stated the facts and conclusions on the issues in the report hereinafter set forth which accompanied his recommended order. With respect to that portion of the permit primarily in issue, namely, the phrase reading "*stock* in trade of drugstores", we agree with the conclusion of the examiner that to the extent respondent is transporting commodities which at the time of their movement are not, or are not intended to become, part of the stock in trade of a drugstore, such operations are in excess of its authority and are in violation of section 209 of the act and should be discontinued. In the circumstances we adopt his report and findings as our own. An appropriate order requiring respondent to cease and desist from the operations found to be unauthorized will be entered.

REPORT OF THE EXAMINER

By order entered January 21, 1954, the Commission, division 5, instituted this investigation with a view to determining whether Andrew G. Nelson, Inc., hereinafter called respondent, is and has been engaged in the transportation of commodities not within the scope of its operating authority, in violation of section 209 (a) of the Interstate Commerce Act, or of any requirement, restriction, term, or condition of its permit. The order further provided for the issuance of such orders and the taking of such other action as the facts and circumstances may appear to warrant, and that upon the failure of respondent to comply with any order issued herein, to conduct a further proceeding to determine whether the respondent's permit should be suspended or revoked.

The matter was referred to the examiner for hearing and the recommendation of an appropriate order thereon. Hearing was held in May 1954, at Chicago, Ill. The Bureau of Inquiry and Compliance, of the Commission, hereinafter called the Bureau, was joined in its support of the [fol. 447] investigation by 19 motor carriers, 3 associations of motor carriers, and the class I rail carriers in western territory.

The respondent operates under the authority of permit No. MC-1194, which was issued on March 13, 1942, pursuant to a "grandfather" application filed on January 2, 1936. The permit was issued in the name of Andrew G. Nelson, doing business as Nelson Warehouse & Express Co., Chicago, Ill., and provided for transportation service in interstate or foreign commerce as specified below:

> New and used store fixtures, new and used household goods, and stock in trade of drugstores, over irregular routes, between points and places in Illinois, Indiana, Iowa, Kentucky, Michigan, Minnesota, Missouri, Nebraska, Ohio, and Wisconsin.

Subsequently, by order dated March 12, 1951, the Commission in No. MC-FC-53070 authorized transfer of the aforesaid operating rights to Andrew G. Nelson, Inc., and the permit was transferred by order dated June 18, 1951. The sole stockholder was Andrew G. Nelson, the original applicant, and on April 1, 1953, he sold his stock to the present operators.

The Bureau introduced evidence showing that in 1953 during the period July 31 to December 16, the respondent transported in interstate commerce the following commodities from consignors, none of whom were drugstores, to the consignees whose business is as indicated: Numerous and varied canned or packaged grocery items to grocery stores or warehouses; dry and liquid cream and fruit juices to food manufacturers; beer and wines to liquor distributors; 100-pound bags of dry glue to a company whose business is not stated of record; candy to a wholesale candy distributor; dry milk to a distributor of that product; malted milk powder and milk food to a manufacturer of drugs and dietetic foods; and automobile batteries to a general merchandising company. It was also shown by the Bureau that in the period from April 24, 1951, to April 1, 1953, the respondent entered into 14 contracts with shippers, and that 32 contracts were signed by the new stockholders in the first 8 months of their management.

Although some of the commodities transported by respondent might be questioned as to whether they constitute part of the stock in trade of a drugstore, the Bureau does not raise such question. Instead, it contends that the authority to transport "*stock* in trade of drugstores" permits only the transportation of commodities which at the time are part of the stock in trade of a drugstore, or are intended for eventual use as the stock in trade of a drugstore. Thus, the Bureau's ultimate contention is that the respondent's permit restricts transportation to authorized commodities moving to or from a drugstore, or to or from a warehouse or other repository when such commodities are earmarked for eventual use as the stock in trade of a drugstore.

[fol. 448] The respondent contends that the description "*stock* in trade of drugstores" permits transportation from and to any consignor and consignee, provided of course that the commodities transported are the same as those sold in drugstores. It is asserted by respondent that the permit does not include any language restricting the transportation to a particular or specified class of consignees.

The sole issue herein is thus explicit and requires a determination of the extent of the authority granted by the commodity description "*stock* in trade of drugstores." None of the parties claim that such description is patently ambiguous, and ambiguity may not be assumed merely from the fact that the Bureau and interveners are in disagreement with respondent as to the meaning of the description. In considering the issue thus presented neither the operations of respondent prior to the "grandfather" date, nor the Commission's intentions with respect thereto in issuing the permit, are of any importance.

The principal contention on behalf of the respondent with respect to the term "*stock* in trade of drugstores" is that such description unequivocally grants authority to transport "commodities described as stock in trade of drugstores." It is then argued that the latter description is obviously unrestricted as to the class of consignees who may be served by respondent. This argument is completely without merit because it is based on the false premise that the respondent's permit authorizes the transportation of "commodities described as stock in trade of drugstores." As stated before, the issue presented herein is explicit, namely, a necessary interpretation of the commodity description "*stock* in trade of drugstores." Any arguments as to the authority granted by the description "commodities described as stock in trade of drugstores," clearly change the basic issue and are irrelevant.

An interpretation of the commodity description "*stock* in trade of drugstores," immediately and obviously presents the initial question as to the purpose of the Commission in emphasizing the word stock by italics. It will be noted that the other commodity descriptions in the permit, namely, "*New and used store fixtures, new and used household goods*" are completely italicized. Therefore, the italicizing of only the word "stock" in the description "*stock* in trade of drugstores" was intentional in order to segregate and emphasize such word within the disputed description. The only possible meaning that can be attached to such segregation and emphasis is that the transportation of "stock," as further defined in the commodity description, is authorized by the permit granted to respondent. The word "stock" in a mercantile sense simply means goods possessed by a merchant or manufacturer. Such goods include articles either for sale or for the possessor's own use. [fol. 449] The following words in the description are "in trade" and they modify the word "*stock*" by restricting it to mean only those goods which are kept by a merchant or manufacturer for sale purposes. The subsequent words in the description are "of drugstores" and they further modify and explain the preceding words "*stock* in trade" by limiting them to a particular class of merchant, namely, one who operates a drugstore.

The correctness of the above interpretation is apparent if attention is directed specifically to the word "of" in the disputed commodity description. Among the numerous definitions applicable to "of," only that connoting possession or ownership has any sensible meaning as used in respondent's permit. In other words, the commodity description under consideration is merely a different but equally effective manner of stating "drugstores' *stock* in trade." The limitation as thus imposed by the commodity description is not restricted to deliveries to drugstores but, as stated by the Bureau, also includes goods which are earmarked for eventual delivery to and sale in a drugstore. Accordingly, respondent's past and continued transportation in excess of that granted by its permit, as described herein, is in violation of section 209 (a) of the act and should be discontinued immediately.

Although there is no such patent ambiguity in the permit as to warrant consideration of events prior to its issuance to Andrew G. Nelson, the correctness of the interpretation set forth hereinbefore is borne out by an examination of the circumstances under which the permit was issued. A hearing was not held in connection with the "grandfather" application but instead the Commission relied on a signed statement from Nelson, accompanied by delivery receipts showing interstate contract movements for Walgreen Company in the period June 27, 1934, to September 21, 1935. The Walgreen Company operates a chain of drugstores throughout the territory respondent is authorized to serve. The statement signed by Nelson contained the following unqualified assertions: "That he is an interstate contract carrier of property for the Walgreen Company and for it alone. That he hauls to and from Walgreen retail stores located within 600 miles of Chicago. That said transportation has to do with the opening, the remodeling, and/or the closing of Walgreen retail stores, the commodities so transported are usually store fixtures and equipment and merchandise for the opening stock." These declarations by Nelson in a signed statement show that he desired only to continue serving retail drugstores of one company. However, the terms of the permit go beyond Nelson's request to the extent that there is no restriction other than territorial in the permit with respect to the transportation of [fol. 450] new and used store fixtures and household goods, and the transportation of the stock in trade of drugstores is not limited to only one chain of drugstores as consignees or ultimate users. With the exceptions noted the permit complies with the transportation that Nelson claimed he was engaged in on the "grandfather" date, and which he wished to continue.

The Commission's power to revoke a permit is circumscribed by express provisions in section 212 (a), and is adequately discussed in *Lane—Revocation of Permit*, 52

M. C. C. 427. In that proceeding, the Commission, division 5, said: "* * * a revocation of a permit may be effected only after a notice and hearing and then only for wilful failure to comply with an order issued after a notice and hearing under section 204 (c)." Thus two "notices and hearings" are required. Notice and hearing which is the very essence of due process means an opportunity to be heard. In *Dohany* v. *Rogers*, 281 U. S. 362, 369, it is said that the requirements of due process are satisfied so far as procedure is concerned if the person "has reasonable notice and reasonable opportunity to be heard and to present his claim or defense, due regard being had to the nature of the proceeding and the character of the rights which may be affected by it." Section 5 of the Administrative Procedure Act provides, in part:

> (a) NOTICE.— * * * In instances in which private persons are the moving parties, other parties to the proceeding shall give prompt notice of issues controverted in fact or law; and in other instances agencies may by rule require responsive pleading. * * *
>
> (b) PROCEDURE.—The agency shall afford all interested parties *opportunity for (1) the submission and consideration of facts*, * * *. [Italics supplied.]

Rule 43 of the General Rules of Practice Before the Commission, reads as follows:

> An order instituting an investigation will be served by the Commission upon respondents. If, within a time period stated in that order, *a respondent fails to comply with any requirement specified therein; respondent shall be deemed in default and to have waived any further hearing.* Thereafter the investigation may be decided without further proceedings. [Italics supplied.]

It is apparent that the statutory requirements of notice and hearing are satisfied if the parties are given a reasonable notice and afforded a reasonable opportunity to be heard, and that in proceedings initiated by an investigation such as here, the Commission may require a responsive pleading respecting the desire of a respondent to an oral hearing; and, in the event respondent fails to comply with this requirement, respondent shall be deemed in default and to have waived its right to such oral hearing. The evidence indicates that respondent will appear at a second hearing in the event of default of the order under section 204 (c) entered herein. Nevertheless, in the circumstances here [fol. 451] present it is appropriate to call upon respondent to inform the Commission, in writing, if it desires an oral hearing (above-mentioned second hearing).

The examiner finds that respondent has been and is engaged in the conduct of operations not within the scope of its operating authority, in violation of section 209 (a) of the act, and that an order should be entered requiring respondent, within 60 days of the effective date of the order, to discontinue such unlawful operations and thereafter maintain only the operations authorized by its permit and to comply with the provisions of section 209 (a) of the act, and within 10 days thereafter inform the Commission in a written statement under oath whether or not compliance has been made therewith.

The examiner further finds that in the event respondent fails, within 60 days of the effective date of the order, to operate only as authorized by its permit and to comply with section 209 (a) of the act, it should be required to inform the Commission, in writing, within the time above specified for informing the Commission regarding compliance or noncompliance, if an oral hearing is desired at which to present further evidence as to why the permit should not be revoked, failing in which respondent shall be deemed in default and to have waived such oral hearing and the matter shall be taken under consideration on the facts then of record with a view to the entry of an order revoking its permit if it should be determined that such action is warranted.

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MATTHEW BENDER & COMPANY
MB

Form B. M. C. 1.

[fol. 471]

GENERAL INSTRUCTIONS

This form is to be used only by Common Carriers engaged in the transportation of property in interstate or foreign commerce on June 1, 1935, and by Contract Carriers so engaged on July 1, 1935, and continuously thereafter. Under any other circumstances, as in cases where operations or extensions have been instituted since applicable date, or in cases of changes in type of service since that date, applications must be filed on separate forms, which will be furnished by the Bureau upon request.

"Certificates of public convenience and necessity" will be issued to Common Carriers and "Permits" to Contract Carriers. Separate forms must be used if application is to be made for both a Certificate and a Permit.

If space provided in form is not sufficient, prepare answer on separate sheet, attach it to application, and give it the same number as question or statement to which it refers. Exhibits and statements attached shall be 8½ by 14 inches in size or folded to these dimensions.

Applications must be filed within 120 days from October 15, 1935. They should be typed and one copy kept in applicant's files. The original of this application, properly signed and sworn to before a notary public, and one additional copy must be returned to:

THE INTERSTATE COMMERCE COMMISSION
BUREAU OF MOTOR CARRIERS
WASHINGTON, D. C.

and one true copy must be filed with the Board, or Governor if there is no Board, of each State within which operations covered by this application are conducted.

The exemptions and conditional exemptions provided in Section 203 (b) of the Motor Carrier Act, 1935, so far as they relate to the transportation of property, are set forth below:

> Nothing in this part (Motor Carrier Act, 1935), except the provisions of section 204 relative to qualifications and maximum hours of service of em-

> ployees and safety of operation or standards of equipment shall be construed to include * * * (4a) motor vehicles controlled and operated by any farmer, and used in the transportation of his agricultural commodities and products thereof, or in the transportation of supplies to his farm; or (4b) motor vehicles controlled and operated by a cooperative association as defined in the Agricultural Marketing Act, approved June 15, 1929, as amended; * * * or (6) motor vehicles used exclusively in carrying livestock, fish (including shellfish), or agricultural commodities (not including manufactured products thereof); or (7) motor vehicles used exclusively in the distribution of newspapers; nor, unless and to the extent that the Commission shall from time to time find that such application is necessary to carry out the policy of Congress enunciated in section 202, shall the provisions of this part, except the provisions of section 204 relative to qualifications and maximum hours of service of employees and safety of operation or standards of equipment apply to: (8) The transportation of * * * property in interstate or foreign commerce wholly within a municipality or between contiguous municipalities or within a zone adjacent to and commercially a part of any such municipality or municipalities, except when such transportation is under a common control, management, or arrangement for a continuous carriage or shipment to or from a point without such municipality, municipalities, or zone, * * * or (9) the casual, occasional, or reciprocal transportation of * * * property in interstate or foreign commerce for compensation by any person not engaged in transportation by motor vehicle as a regular occupation or business.

If an operator is in doubt as to whether the service he renders comes within the above-named exemptions, he should file an application within 120 days of October 15, 1935; otherwise, he will not be able to obtain a certificate or permit as of right. The Commission, on request, will undertake hearings to determine the circumstances under which transportation is "between contiguous municipalities or within a zone adjacent to and commercially a part of any such municipality." The words "under a common control, management, or arrangement for a continuous carriage or shipment" imply a joining of two or more carriers in a through service over their respective routes in interstate or foreign commerce. The most common evidence of such transportation is the carriage of property on through bills of lading or through rates, without the intervention of the shipper or consignee at the interchange or transfer point.

For the purpose of this application, operations conducted within any reservation under the exclusive jurisdiction of the United States are considered interstate in character. However, operations principally for the purpose of transporting passengers within the national parks and national monuments and under the control of the Secretary of the Interior are exempted.

Applicant's attention is called to the penalties for unlawful operations and practices provided in section 222 of the act.

SPECIAL INSTRUCTIONS

(1) State whether individual, firm, partnership, corporation, company, association, joint-stock association, or other form of enterprise, or a trustee, receiver, assignee, or personal representative thereof.

(2) June 1, 1935, if a Common Carrier; July 1, 1935, if a Contract Carrier.

(3) Typical example of route description, as required in II-A-1-(a):

1. Between Kansas City, Mo., and Denver, Colo., as follows:
    - (*a*) From Kansas City, Mo., to Salina, Kans., via U. S. Highway No. 40.
    - (*b*) From Salina, Kans., to Oakley, Kans., via U. S. Highway No. 40 South.

(c) From Oakley, Kans., to Junction with U. S. Highway No. 40 North via U. S. Highway No. 83.

(d) From Junction of U. S. 83 and U. S. 40 North to Limon, Colo., via U. S. Highway No. 40 North.

(e) From Limon, Colo., to Denver, Colo., via U. S. Highway No. 40.

Return trip over same route.

(4) By "off-route point" is meant any point not situated on a main highway but which is served by a vehicle using such highway as part of its regular route. The words are not meant to include points served by branch or feeder lines.

[fol. 472] STATEMENT B-1-A (1).

I, Richard W. Sharpless, Secretary of the Public Service Commission, do hereby certify that the above and foregoing is a true and correct copy of Order No. 351-B, 1 as the same appears of record in the office of the Public Service Commission, this 14th day of November 1935.

/s/ RICHARD W. SHARPLESS
Secretary

[fol. 473] STATE OF INDIANA :

PUBLIC SERVICE COMMISSION

IN THE MATTER OF THE PETITION OF ANDREW G. NELSON D/B/A NELSON WAREHOUSE & EXPRESS COMPANY, OF CHICAGO, ILL., FOR A PERMIT TO OPERATE MOTOR VEHICLES AS A CONTRACT CARRIER OF PROPERTY, INTERSTATE

No. 351-B. 1

APPROVED: October 14, 1935

APPEARANCES:

For petitioner—Coleman Pattison, Atty., Indianapolis, Indiana

For protestants—L. W. Horning, Atty., Indianapolis, Indiana NR RR; C & St L RR; Elgin NYC RR; Penn RR; C & O RR; ILLC RR; GTW RR; PM RR; Ry. Ex. Agcy.

MC RR; C I & L RR; Wabash B & O RR; Erie RR; L & N RR; J & E RR; C & EI RR; CM ST.P &P,

BY THE COMMISSION
Loser, Examiner

On the 15th day of June, 1935, Andrew G. Nelson, d/b/a Nelson Warehouse & Express Company of Chicago, Illinois, filed application for a permit to operate motor vehicles as a contract carrier of property, interstate, over the following route, to-wit:

"Various Routes"

The said application was set for hearing in the Rooms of the Commission, 401 State House, Indianapolis, Indiana, at 9:00 o'clock A. M. Monday, September 16, 1935, and legal notice of the time and place of said hearing was given by the Commission by publication on the 28th day of August, 1935, in the Indianapolis Times and the Hoosier Sentinel, being two newspapers of general circulation printed and published in the City of Indianapolis, Marion County, Indiana.

EXHIBIT A

Andrew G. Nelson, doing business as
Nelson Warehouse & Express Co.
(Name of applicant)

Except as otherwise noted, the following information is to be as of June 1, 1935, if application is for a Certificate; and as of July 1, 1935, if application is for a Permit. However, this instruction is not intended to confine all answers of applicant strictly to such dates. The information given should, where necessary, cover a sufficient period prior to such dates to give a clear and fair picture of the nature and extent of the business of applicant which properly should be covered by the Certificate or Permit sought under the "Grandfather" clause.

TYPE OF SERVICE AND ROUTES AND TERRITORY SERVED

I. Type of service:

A. Applicant (or predecessor in interest) was engaged in the business of transporting, in interstate or foreign commerce, property, consisting of ~~(1) commodities generally, except~~ X (Indicate exceptions, either specifically or by their general nature) or (2) special commodities comprising store fixtures, miscellaneous merchandise and household furniture (Indicate class or classes of commodities transported) (Strike out (1) or (2), whichever is inapplicable to applicant's business.)

B. Applicant (or predecessor) undertook to transport property for the general public for hire X (Yes) No (No) If answer is "No", state for whom applicant (or predecessor) transported under special contracts or agreements:

Name	*City and street address*	*Written or verbal*
Walgreen Co.	744 Bowen Ave., Chicago, Illinois	Verbal
X	X	X
X	X	X

1194

C. Applicant has continued to operate as above stated without any change in the type or extent of service and is now so operating Yes (Yes) X (No) If the answer is "No", state in detail character and extent of such changes X

X

X

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D. If service was not rendered on or has been interrupted since statutory date, give facts and reasons clearly and in detail

Service has been continuously rendered as required, and has not been interrupted

II. Description of each route regularly operated on X (2) 1, 1935:

A. By applicant (or predecessor in interest) in own right:

Form B.M.C. 1

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PROPERTY CARRIER APPLICATION

(Under "Grandfather" Clause)

(This form for use only by Common Carriers engaged in transportation of property in interstate or foreign commerce on June 1, 1935, and by Contract Carriers so engaged on July 1, 1935, and continuously thereafter)

(Before answering, read General Instructions on last page. Numbers under line refer to Special Instructions on that page)

BEFORE THE INTERSTATE COMMERCE COMMISSION

Application of Andrew G. Nelson, doing business as Nelson Warehouse & Express Co. (Full and correct name) for a permit (Certificate or permit) to operate as a contract carrier (Common carrier or contract carrier) of property, under the Motor Carrier Act, 1935.

Docket No. 1194 (Do not fill in)

INTERSTATE COMMERCE COMMISSION
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APPLICATION

To the Interstate Commerce Commission, Washington, D. C.

APPLICANT STATES:

That full and correct name of applicant is Andrew G. Nelson, doing business as Nelson Warehouse & Express Co.

Business address 1119 E. 42nd St. (Street and number) Chicago (City)

Cook County (County) Illinois (State)

That applicant is an individual (1), doing business under the trade name or style of Nelson Warehouse & Express Co.

That applicant, if a corporation, was organized under the laws of the State of x; and that, if a partnership, the names and addresses of the partners are as follows:

Name	*State, City, and Street Address*
x	x
x	x
x	x

If an association, describe clearly its character x

That the type of service furnished and the operations conducted by the applicant (or predecessor in interest) on July (2) 1, 1935, were as shown in EXHIBIT A, and that no change has occurred therein since that date, except as shown in that exhibit.

That applicant submits as evidence in support of statements contained in EXHIBIT A, the information contained in EXHIBIT B.

That applicant will submit such additional information to substantiate the applicant's prayer herein as the Commission may require.

That applicant has complied with the order of the Commission relative to the service of application on interested parties as shown in EXHIBIT C.

Exhibit A, Continued

B. Has applicant acquired or instituted a route or routes since ______X______ (2) 1, 1935? ______ (Yes) X ______ (No) If so, attach statement (designated as II–B), giving, for each such route, the information requested in (A) above and name and address of predecessor, if any. Attach copy of purchase agreement, State certificate or permit, or other documents evidencing acquisition or institution of each such route or routes.

C. Does applicant herein apply for rights over any route or routes operated by others under agreement? ______ (Yes) X ______ (No) If so, attach statement (designated as II–C), giving, for each such route, the information requested in (A) above and name and address of operator. Attach copy of lease or operating agreement.

D. Does applicant operate over any route or routes under a lease or operating agreement? ______ (Yes) X ______ (No) If so, attach statement (designated as II–D), giving, for each such route, the information requested in (A) above and name and address of the other party to such lease or agreement. Attach copy of such lease or agreement.

E. Has applicant abandoned or otherwise disposed of any route or routes since ______X______ (2) 1, 1935? ______ (Yes) X ______ (No) If so, attach statement (designated as II–E), giving, for each such route, the information requested in (A) above, the manner and date of disposition, and name and address of successor, if any. Attach copy of the sales agreement or other documents evidencing such disposal.

F. Were operations on any of the above routes or parts of routes begun since January 1, 1935? ______ (Yes) X ______ (No) If so, give the date on which operations commenced ______X______

G. Were operations on any of the above routes or parts of routes seasonal? ______ (Yes) X ______ (No) If so, attach statement (designated as II–G), giving the facts clearly and in detail, showing applicant's customary operation, including months of normal operating season.

III. Description of operations over irregular routes on ______July______ (2) 1, 1935:

A. Location of applicant's headquarters 1119 E. 42nd St., Chicago, Illinois

B. Where did applicant obtain the main volume of its traffic? If a place or places, name them; if a territory, describe it fully Chicago, Illinois, and territory within a radius of approximately six hundred miles thereof ______X______

C. To what principal place, places or territory did applicant transport such traffic? Answer as in (B) various municipalities within a radius of approximately six hundred miles from Chicago, Illinois

D. If answers to the above questions do not adequately and completely describe applicant's operations on ______July______ (2)

Form B. M. C. 1

EXHIBIT B

Andrew G. Nelson, doing business as
Nelson Warehouse & Express Co.
(Name of applicant)

EVIDENCE OF OPERATION

Applicant as a common carrier on June 1, 1935, or a contract carrier on July 1, 1935, submits the following evidence as proof of his operations:

A. Certified copy of any order of any State authorizing applicant's or predecessor's operations and of any order authorizing transfer of such authority to applicant. (Attach and identify as statement B-I-A.)

B. That applicant or a predecessor was registered under a Code of Fair Competition as follows:

REGISTRANT (If predecessor, give name)	Name of code	Date or dates of registration
Nelson Warehouse & Express	Code of Fair Competition for the Trucking Industry. (Reg. No. 101065)	August 24, 1934

C. Any other proof deemed necessary by applicant, such as affidavits, bills of lading, route schedules, pony of entry receipts, etc. (Attach and identify as statement B-I-C.)

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INTERSTATE COMMERCE COMMISSION
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C. Any other proof deemed necessary by applicant, such as affidavits, bills of lading, route schedules, pony of entry receipts, etc. (Attach and identify as statement B-I-C.)

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JAN 2 1936

EXHIBIT C

CERTIFICATE OF SERVICE

I, Andrew G. Nelson (Name of affiant), Owner (Title of affiant) of the applicant, do hereby certify that upon the 30th day of December, 1935, I served the foregoing application upon the Boards, Commissions, or officials (or the Governor where there is no Board, Commission, or official) of the States of Illinois, Indiana, Iowa, Michigan, Minnesota, Missouri, Nebraska, Ohio, Wisconsin, in which States applicant operates, by delivering in person (or mailing by registered mail) a true, correct, and complete copy of this application to each thereof at the following addresses:

(as per list attached hereto and marked "Exhibit C-1")
(Name of Board, etc.) (Address)

x

x

Andrew G Nelson
(Applicant)

Further notice of the time and place of said hearing was given by the Commission in accordance with Chapter 287 of the Acts of the General Assembly, 1935.

This cause came on for hearing in its regular order at the time and place named in the said notice.

[fol. 474] Mr. Andrew G. Nelson of Chicago testified that he is the sole owner of the Nelson Warehouse and Express Company. That he owns eight pieces of equipment which he intends to operate over the proposed route. That he has entered into a contract with the Walgreen Company, engaged in the Drug business. That the hauling contemplated is the hauling of fixtures and supplies only when the Walgreen Company opens, closes or remodels one or more of their Drug Stores located in an Indiana City. That under this operation he would not enter the state more than ten times a year. That his equipment is especially constructed for this type of work. That he would not use more than two pieces of equipment. That he has a contract carrier's permit for Wisconsin and one for Minnesota to do this kind of work.

Mr. W. E. Henry of Berwyn, Illinois, testified that he is the General Traffic Manager for the Walgreen Company and that he is familiar with the service to be rendered by the applicant. That if this permit were refused the Walgreen Company would have to buy their own equipment. That the rate in the contract provides for $2.50 per hour. That this rate would amount to more than the rail rates. That his Company is willing, however, to file any rate necessary to meet the requirements of the Indiana Public Service Commission. That the hauling the applicant would be required to do would be the hauling of store fixtures such as shelves, soda fountains, and other supplies connected with the opening, closing, or remodeling of one of the Walgreen Drug Stores.

The Commission finds that the contract entered into between Andrew G. Nelson and the Walgreen Drug Company is sufficient as to form.

The Commission further finds that a permit to operate motor vehicles as a contract carrier of property, interstate, over the route as set out below, should be issued and it will be so ordered.

[fol. 475] IT IS THEREFORE ORDERED BY THE PUBLIC SERVICE COMMISSION that a permit to operate motor vehicles as contract carrier of property, interstate, be issued to Andrew G. Nelson, d/b/a Nelson Warehouse Express Company, 1119 East 42nd Street, Chicago, Illinois, over the routes as follow, to-wit:

> Over all state and Federal highways necessary to reach a Walgreen and Company Drug Store.

IT IS FURTHER ORDERED by the Public Service Commission that operations under this permit be restricted to hauling for the Walgreen and Company under the contract submitted to the Commission.

Andrew G. Nelson,
d/b/a Nelson Warehouse & Express, Co.,
Chicago, Illinois.
No. 351-B, 1.

TRABUE, COOK—CONCUR—MCCART ABSENT

APPROVED: October 11, 1935

ATTEST: /s/ RICHARD W. SHARPLESS
Secretary

[fol. 476] IT IS FURTHER ORDERED that before beginning operation the applicant shall file and at all times, thereafter, keep on file insurance as provided by law and to the approval of the Commission.

IT IS FURTHER ORDERED before beginning operations the applicant shall file with and to the approval of the Commission contracts in accordance with Chapter 287, of the laws of the General Assembly of the State of Indiana, 1935, and the rules and regulations of the Commission.

IT IS FURTHER ORDERED that before operating any motor vehicles upon the highways of this state under the said certificate, the applicant shall number and letter the same as provided in the rules and regulations approved by the Commission, as follows, to-wit: No motor vehicle shall be operated for hire over the highways of this state, unless there shall be painted in a conspicuous place on each side thereof, also on the front and rear of each such vehicle, in letters and figures not less than two inches in height and not less than one-fourth inch in width, the name of the certificate or permit holder, followed by the letters, "P. S. C. I." and number of the certificate or permit as the case may be. In the event it is not practical to place such lettering in a location so as to be at all times plainly visible to the traveling public, then the required letters, numbers, and words may be placed on a plate or plates, which plate or plates, shall be attached to the front and/or rear of such vehicle in such manner that the letters, numbers and words will at all times be plainly visible to the traveling public. In addition, there shall also be painted on each motor vehicle the number of that vehicle, each vehicle being numbered consecutively, which number will be discontinued when the vehicle it covers is discontinued (it being the intent and purpose that each number shall die with the motor vehicle.)

IT IS FURTHER ORDERED that the holder applicant shall abide by any and all rules or regulations or orders of the Commission now in effect or which may be adopted and the laws of the State of Indiana.

Andrew G. Nelson,
d/b/a Nelson Warehouse & Ex. Co.,
Chicago, Illinois.
No. 351-B, 1.

TRABUE, COOK—CONCUR—MCCART ABSENT
APPROVED: October 11, 1935

ATTEST: /s/ RICHARD W. SHARPLESS
Secretary

[fol. 477]

STATEMENT B-1-A (2)

BEFORE THE

PUBLIC SERVICE COMMISSION OF WISCONSIN

TO ALL TO WHOM THESE PRESENTS SHALL COME:

I, Wm. M. Dinneen, do hereby certify that I am Secretary of the Public Service Commission of Wisconsin, and that as such officer have the charge and custody of all the files and records of the Commission; that the annexed documents, purporting to be copies of Contract Motor Carrier's License No. IC 274 issued to Andrew G. Nelson and Amendment No. 1 to said license IC 274, have been by me compared with the originals on file with the Commission, and that the same are true copies of the said originals and of the whole thereof.

IN WITNESS WHEREOF, I have set my hand hereunto this 12th day of November, 1935, and caused the seal of the Commission to be affixed.

/s/ WM. M. DINNEEN
Secretary
Public Service Commission of Wisconsin

[fol. 478] PUBLIC SERVICE COMMISSION OF WISCONSIN

INTERSTATE CONTRACT MOTOR CARRIER

LICENSE NO. IC 274

ISSUED TO Andrew G. Nelson, doing business as Nelson Warehouse and Express Company, 1119 East 42nd Street, Chicago, Illinois

The above-named licensee, having duly made application for a license authorizing him to operate as a contract motor carrier as defined by section 194.01, Statutes, in interstate commerce only, as more specifically hereinafter described, and it appearing by said application that the said operation will not unreasonably contravene any proper public interest within the protection of Chapter 194, Statutes, and the Commission having directed, therefore, the issuance of a license in response to said application for the operations and service hereinafter described;

NOW, THEREFORE, THIS LICENSE is issued authorizing said applicant to perform the following operations, and to furnish the following services as a contract motor carrier engaged exclusively in interstate commerce:

The transportation of store fixtures for Walgreen Drug Stores, between various municipalities, on vari-

> ous highways, except highway 12 between 5 and 9 P.M. from July 1 to October 1 inclusive between Madison and Middleton and between Genoa City and Lake Geneva, highway 16 between Pewaukee and Oconomowoc, highway 41 between the Illinois state line and DePere, highway 19 between the junction of highway 30 and 18 and Pewaukee, highway 42 between Milwaukee and Racine, highway 51 between Beloit and Janesville and that portion of said highway 51 constituting the narrow posted bridge at Indian Ford, and highway 141 between the Milwaukee-Ozaukee county line and Port Washington.

In witness whereof these presents have been signed and the official seal of the Commission affixed hereto at Madison, Wisconsin, this 2nd day of August, 1934.

Public Service Commission of Wisconsin
(Signed) Wm. M. Dinneen
Secretary

(Seal)

[fol. 479] Public Service Commission of Wisconsin

Amendment No. 1

To Contract Motor Carrier License No. IC 274

License No. IC 274 issued to Andrew G. Nelson on the 2nd day of August, 1934, authorizing him to engage in transportation of property by motor vehicle as a contract motor carrier is hereby amended by adding to the authorization in said license the authority to perform the following operations and furnish the following service as a contract motor carrier:

> Transportation of household goods of employees of Walgreen Drug Stores and of merchandise for said Walgreen Drug Stores, between various municipalities, on various highways as authorized in said license.

This amendment being No. 1 to license No. IC 274, and now forming a part thereof, is issued in accordance with appropriate findings and order of the Commission made on the 22nd day of March, 1935.

In witness whereof these presents have been signed and the official seal of the Commission affixed hereto at Madison, Wisconsin, this 28th day of March, 1935.

Public Service Commission of Wisconsin
(Signed) Wm. M. Dinneen
Secretary

(Seal)

[fol. 480] STATEMENT B-1-C

AFFIDAVIT.

W. E. Henry, being first duly sworn, deposes and says that he resides at 2627 S. Oak Park Ave. in the city of Berwyn, county of Cook and state of Illinois; that he is now, and has been for a number of years, engages in the occupation of traffic manager for Walgreen Co., an Illinois corporation having it's principal offices at 744 Bowen Avenue, Chicago, Illinois; and that as such traffic manager it is his duty to, among other things, arrange and contract for, and order and supervise, the transportation of store fixtures and miscellaneous merchandise belonging to said Walgreen Co., and household goods of certain of said company's employes.

Affiant further deposes and says that Andrew G. Nelson, doing business as Nelson Warehouse & Express Co., having his principal office and place at 1119 East 42nd Street, Chicago, Illinois, is on this date, and has been continuously since the year A.D. 1919, under contract with said Walgreen Co., to transport by motor vehicle over various routes, between various municipalities, on various highways, store fixtures and miscellaneous merchandise, and household goods of employes, for Walgreen Co., in connection with the opening, closing and remodeling of stores, all over such state and federal highways within a radius of approximately six hundred (600) miles from Chicago, Illinois, as may be necessary to reach a Walgreen Co., drug store.

(Yes) (No)

X

X

RECEIVED
JAN

D. If service was not rendered on or has been interrupted since statutory date, give facts and reasons clearly and in detail

Service has been contimuously rendered as required, and has not been interrupted

II. Description of each route **regularly operated** on X (2) 1, 1935:

A. By applicant (or predecessor in interest) in own right:

1. Between X and X (Indicate furthermost points on route), as follows:

(a) From X to X, via Highway X
(Indicate furthermost points under each highway number) (Use U. S. highway number wherever applicable, otherwise, State or county highway number)

(b) From X to X, via Highway X

(c) From X to X, via Highway X

(d) From X to X, via Highway X

(e) From X to X, via Highway X
(Repeat as above for each route and part thereof. See example in Note 3 on last page. Indicate in each case whether return routes correspond to those above described. If not, furnish similar description for return route. Furnish map showing each route.)

Show also, for each route separately:

(1) Whether all intermediate points were served (Yes) X (No); if not, indicate exceptions: X

X

(2) The off-route points served X (4)

X

(3) Character of traffic (that is, commodities generally, with certain exceptions; special commodities, etc.)

X
(Specify exceptions, or special commodities)

(4) Frequency of service (where interval between schedules was more than a day) X

(5) Points at which traffic was interchanged, with whom interchanged, and the arrangement under which interchange was effected, including whether or not through rates were used X

X

x

x x

If an association, describe clearly its character x

That the type of service furnished and the operations conducted by the applicant (or predecessor in interest) on July (3) 1, 1935, were as shown in Exhibit A, and that no change has occurred therein since that date, except as shown in that exhibit.

That applicant submits as evidence in support of statements contained in Exhibit A, the information contained in Exhibit B.

That applicant will submit such additional information to substantiate the applicant's prayer herein as the Commission may require.

That applicant has complied with the order of the Commission relative to the service of application on interested parties as shown in Exhibit C.

Wherefore, The applicant herein prays: That the Commission issue a permit (Certificate or permit) to operate as a contract carrier (Common carrier or contract carrier) of store fixtures, miscellaneous merchandise and household furniture (State whether commodities generally, with certain exceptions, or special commodities only);

and applicant further prays that if the facts herein contained show that applicant, although applying for a permit (Certificate) (Permit), is entitled to a certificate (Permit) (Certificate), this application be considered to be one for the appropriate form of authority.

Dated this [illegible] day of December, 1935

Andrew G. Nelson, doing business as
Nelson Warehouse & Express Co.
(Applicant)

By Andrew G. Nelson (Title) Owner

OATH

State of Illinois
County of Cook } ss:

Andrew G. Nelson (Name of affiant) makes oath and says that he is the Owner (Title of affiant) of the Andrew G. Nelson, doing business as Nelson Warehouse & Express Co. (Name of applicant); that he is authorized on the part of said applicant to verify and file with the Interstate Commerce Commission this application and exhibits attached thereto; that he has carefully examined all of the statements contained in such application and the exhibits attached thereto and made a part thereof; that he has knowledge of the matters set forth therein and that all such statements made and matters set forth therein are true and correct to the best of his knowledge, information, and belief.

Andrew G. Nelson

Subscribed and sworn to before me, a notary public in and for the State and County above named, this 30th day of December, 1935.

[SEAL]

F. C. Hamilton

My commission expires November 22, 1937

—1414

miles thereof .... x ....

C. To what principal place, places or territory did applicant transport such traffic? Answer as in (B) various municipalities within a radius of approximately six hundred miles from Chicago, Illinois

D. If answers to the above questions do not adequately and completely describe applicant's operations on July (2) 1, 1935, describe operations clearly and in detail operations involve transportation over various routes, between various municipalities, on various highways, of store fixtures and miscellaneous merchandise, and household goods of employes, for Walgreen Co., in connection with the opening, closing and remodeling of stores

x

E. Have there been any changes in the nature or extent of applicant's irregular route operations between July (2) 1, 1935, and date of this application? x (Yes) No (No) If so, describe the changes in detail

x

x

x

IV. A. Number of vehicles in revenue service on July (2) 1, 1935:

Trucks 3, Tractors x, Semitrailers x, 2-wheel trailers x, 4-wheel trailers x

in interstate service

Total owned by applicant 3; total leased to applicant x Number of vehicles leased by applicant to others x

B. Number of vehicles in revenue service on date of this application:

Trucks 3, Tractors x, Semitrailers x, 2-wheel trailers x, 4-wheel trailers x

in interstate service

Total owned by applicant 3; total leased to applicant x Number of vehicles leased by applicant to others x

And further affiant saith not.

In witness whereof, affiant has hereunto attached his hand and seal, the 12 day of Nov., A.D. 1935.

/s/ W. E. Henry (Seal)

Subscribed and sworn to before
me, a Notary Public in and for the
county of Cook and state of Illinois, this
12th day of November, A.D. 1935

/s/ G. E. Stewart

(My commission expires Dec 3–1938)

[fol. 481] Exhibit C-1

(Name of Board, etc.)	(Address)
Illinois Commerce Commission	Springfield, Illinois
Indiana Public Service Commission	Indianapolis, Indiana
Iowa Board of Railroad Commissioners	DesMoines, Iowa
Michigan Public Utilities Commission	Lansing, Michigan
Minnesota Railroad & Warehouse Commission	St. Paul, Minnesota
Missouri Public Service Commission	Jefferson City, Missouri
Nebraska State Railway Commission	Lincoln, Nebraska
The Public Utilities Commission of Ohio	Columbus, Ohio
Public Service Commission of Wisconsin	Madison, Wisconsin

[fol. 482] No. M. C. 1194

Andrew G. Nelson, Contract Carrier Operation

Before Supervisor John G. Petritz, at Chicago, Illinois, on November 9, 1936, personally appeared Andrew G. Nelson and made the following statements and representations:

1. That he is the applicant in M. C. 1194, and that his correct name is:

   Andrew G. Nelson

2. That his business address (since 1924) is:
   1119 East 42nd Street
   Chicago, Illinois

3. That he is an individual, doing business as:
   Nelson Warehouse & Express Co.

4. That on July 1, 1935, he owned and operated 8 trucks, and that he owns and operates the same number at the present time, (only three units, however, are used in contract interstate work, the balance of the equipment is used as follows:

   2 Dump trucks are used in applicant's coal business and 3 other trucks are used in applicant's local cartage business.

5. That he carries insurance on all his equipment, however, cargo insurance on the three units used in interstate contract hauling is carried by the Walgreen Company of Chicago. His P. D. and P. L. insurance is as follows:
   Property Damage—$5,000 limit.
   Public Liability—$10,000 and $50,000 limits.
   P. L. and P. D. is carried in General Accident and Assurance Company of Perth, Scotland. No. A-858145—expires 1/1/37 J.G.P. That he has notified his insurance broker to have the proper insurance certificates filed with the Commission at Washington prior to December 15, 1936.

6. That he has on file with the Commission at Washington a copy of his contract with Walgreen Company, as well

as his schedule of minimum rates. (additional copy of each is attached hereto)

7. That he is an interstate contract carrier of property for the Walgreen Company and for it alone.

8. That he hauls to and from Walgreen Retail Stores located within 600 miles of Chicago. That said transportation has to do with the opening, the remodeling, and/or the closing of Walgreen retail stores, the commodities so transported are usually store fixtures and equipment and merchandise for the opening stock.

That the household goods hauled are only for employees of the Walgreen Company and that payment for said transportation is taken care of by the Walgreen Company. This movement amounts to approximately ten trips per year. That his equipment usually returns empty, except for old store fixtures and equipment and occasionally a transfer of stock for Walgreen Company.

That he has control over the three units which are used for Walgreen Company and that he believes himself to be a contract operator and not a lessor of equipment.

[fol. 483] 9. That he submitted the following to Supervisor Petritz for inspection as proof of operations:

(1) Certificate of Registration, No. 101065, under trucking code, dated Aug. 24, 1936. ← 1934

(2) Original contract between Walgreen Company and applicant, dated September 16, 1935—the one that is still in use and which a copy of is attached hereto. (Prior to 1935 applicant stated his contract with Walgreen was verbal)

(3) Wisconsin Inspector's Report dated Nov. 24, 1934 and Interim Receipt No. 10699 of same date.

(4) Copy of affidavit from Traffic Manager of Walgreen Company stating that applicant has continuously been doing interstate transportation for his company since 1919. (the original affidavit, applicant states, is on file with his application at Washington)

(5) Original Contract Carrier Permit from State of Wisconsin, No. I. C. 274 and dated August 2, 1934. Original Contract Carrier Permit from State of Indiana, No. 351-B1, dated October 11, 1935. Copy of Mileage Report to State of Minnesota for year of 1934, as well as registration card from Minnesota for year 1935.

(6) An assortment of delivery receipts (17) dated from June 27-1934 to Sept 21-1935 showing interstate contract movements for Walgreen Company in the following States, Illinois, Michigan, Indiana, Ohio, Kentucky, Missouri, Nebraska, Iowa, Minnesota and Wisconsin.

10. That his operations, except for frequency of service, have been the same for the past seventeen years.

11. That the foregoing statement of facts is true and correct to the best of my knowledge and belief.

/s/ Andrew G. Nelson
Andrew G. Nelson

12. Dated at Chicago, Illinois, November 11, 1936.

[fol. 484] **Affidavit**

David Harding, being first duly sworn, deposes and says that he resides at 440 East 43rd Street in the city of Chicago, county of Cook and state of Illinois; that he is a member of International Brotherhood of Teamsters, Chauffeurs, Stablesmen and Helpers Union No. 711. That he is now and has been since 1920 engaged in the occupation of warehouse foreman for Andrew G. Nelson, doing business as Nelson Warehouse & Express Co., 1119 East 42nd St., Chicago, Illinois. That it is his duty among other things to check loads, supervise the transportation of store fixtures, miscellaneous merchandise and household goods belonging to Walgreen Company or their employees.

Affiant further deposes and says that he has ordered the various motor vehicles over various routes, between various municipalities on various highways, containing store fixtures, miscellaneous merchandise and household goods belonging to Walgreen Company or their employees, in connection with the opening, closing and remodeling of stores all over such states and federal highways within the radius of approximately six hundred (600) miles from Chicago, Illinois. He further deposes and says that he has personal knowledge of trucks being sent to the states of Michigan, Ohio, Indiana, Kentucky, Illinois, Missouri, Iowa, Nebraska, Wisconsin and Minnesota. Previous to July 1st 1935.

Affiant further deposes and says the type of business done by Andrew G. Nelson as Nelson Warehouse & Express Co., 1119 E. 42nd St., Chicago, Ill., has not materially changed since his employment in 1920.

And further affiant saith not.

In witness whereof, affiant has hereunto attached his hand and seal, the tenth day of November, A.D. 1936.

/s/ David Harding (Seal)

Subscribed and sworn to before me, a Notary Public in and for the county of Cook and state of Illinois, this 10th day of Nov. A.D. 1936.

/s/ G. E. Stewart
/s/ R. C. Somers, Witness

(My commission expires Dec. 3-1938.)

[fol. 485] **Affidavit**

Jacob Jacoby, being first duly sworn, deposes and says that he resides at 513 West 66th Street in the city of Chicago, county of Cook and state of Illinois; that he is a member of International Brotherhood of Teamsters, Chauffeurs, Stablesmen and Helpers Union No. 704. That he is now and has been since 1930 engaged in the occupation of chauffeur for Andrew G. Nelson, doing business as Nelson Warehouse & Express Co., 1119 East 42nd St., Chicago, Illinois. That it is his duty among other things to drive various vehicles containing store fixtures, miscellaneous merchandise and household goods belonging to Walgreen Company or their employees.

Affiant further deposes and says that he has driven various motor vehicles over various routes, between various municipalities on various highways, containing store fixtures, miscellaneous merchandise and household goods belonging to Walgreen Company or their employees, in connection with the opening, closing and remodeling of stores all over such states and federal highways within the radius of approximately six hundred (600) miles from Chicago, Illinois. He further deposes and says that he personally has driven trucks being sent to the states of Michigan, Ohio, Indiana, Kentucky, Illinois, Missouri, Iowa, Nebraska, Wisconsin and Minnesota. Previous to July 1st 1935.

Affiant further deposes that while out of the city in addition to regular wages and overtime all traveling expenses including meals and lodging were paid by Andrew G. Nelson as Nelson Warehouse & Express Company.

Affiant further deposes and says the type of business done by Andrew G. Nelson as Nelson Warehouse & Express Co., 1119 East 42nd St., Chicago, Ill., has not materially changed since his employment in 1930.

And further affiant saith not.

In witness whereof, affiant has hereunto attached his hand and seal, the tenth day of November, A.D. 1936.

/s/ JACOB F. JACOBY (SEAL)

Subscribed and sworn to before
me, a Notary Public in and for the
county of Cook and state of Illinois,
this 10th day of Nov. A.D. 1936.

/s/ G. E. STEWART
/s/ R. C. SOMERS, Witness

(My commission expires Dec. 3-1938.)

AFFIDAVIT

Robert Stewart, being first duly sworn, deposes and says that he resides at 216 East 69th Street in the city of Chicago, county of Cook and state of Illinois; that he is a member of International Brotherhood of Teamsters, Chauffeurs, Stablesmen and Helpers Union No. 711. That he is now and has been since 1930 engaged in the occupation of chauffeur for Andrew G. Nelson, doing business as Nelson Warehouse & Express Co., 1119 East 42nd St., Chicago, Illinois. That it is his duty among other things to drive various vehicles containing store fixtures, miscellaneous merchandise and household goods belonging to Walgreen Company or their employees.

Affiant further deposes and says that he has driven various motor vehicles over various routes, between various municipalities on various highways, containing store fixtures, miscellaneous merchandise and household goods belonging to Walgreen Company or their employees, in connection with the opening, closing and remodeling of stores all over such states and federal highways within the radius of approximately six hundred (600) miles from Chicago, Illinois. He further deposes and says that he personally has driven trucks being sent to the states of Michigan, Ohio, Indiana, Kentucky, Illinois, Missouri, Iowa, Nebraska, Wisconsin and Minneseta. Previous to July 1st 1935.

Affiant further deposes that while out of the city in addition to regular wages and overtime all traveling expenses including meals and lodging were paid by Andrew G. Nelson as Nelson Warehouse & Express Company.

Affiant further deposes and says the type of business done by Andrew G. Nelson as Nelson Warehouse & Express Co., 1119 East 42nd St., Chicago, Ill., has not materially changed since his employment in 1930.

And further affiant saith not.

In witness whereof, affiant has hereunto attached his hand and seal, the tenth, day of November, A.D. 1936.

/s/ Robert Stewart (Seal)

Subscribed and sworn to before
me, a Notary Publ[illegible] in and for the
county of Cook and state of Illinois,.
this 10th day of Nov., A.D. 1936.

/s/ G. E. Stewart
/s/ R. C. Somers, Witness

(My commission expires Dec. 3, 1938.)

[fol. 487] The following original signed tickets are hereby submitted:

On September 21st 1935 ticket # 30624 delivered miscellaneous fixtures to 401 S. 16th St., Omaha, Nebraska.

On September 16th 1935 # 30580 delivered miscellaneous fixtures to 401 S. 16th St., Omaha, Nebraska.

On June 11th 1935 ticket # 29721 delivered miscellaneous fixtures to 129 W. Superior St., Duluth, Minnesota.

On April 20th 1935 ticket # 27250 delivered miscellaneous fountain outfit to 401 Jefferson St., Louiville, Kentucky.

On June 27th 1935 ticket # 29853 delivered miscellaneous store fixtures to 400 Main St., Peoria, Illinois.

On June 26th 1935 ticket # 29878 picked up miscellaneous merchandise at 620 Adams St., Toledo, Ohio.

On June 26th 1935 ticket # 29848 delivered miscellaneous fixtures to 134 N. Main St., Rockford, Illinois.

On June 24th 1925 ticket # 29827 delivered miscellaneous merchandise to 228 W. College St. Appleton, Wis.

On June 20th 1935 ticket # 29791 delivered miscellaneous fixtures to 102 W. Michigan Ave., Jackson, Michigan.

On June 27th 1934 ticket # 27102 picked up miscellaneous equipment and stock at 214 16th St. Omaha, Neb.

On June 18th 1935 ticket # 29781 delivered miscellaneous fixtures to 228 W. College St., Appleton, Wis.

On May 20th 1935 ticket # 29536 delivered miscellaneous fixtures to 202 Merridian St., Indianapolis, Ind.

On May 15th 1935 ticket # 29483 delivered miscellaneous fixtures to 32 E. Mifflin St., Madison, Wis.

On May 13th 1935 ticket # 29465 delivered miscellaneous fixtures and picked up miscellaneous merchandise at 1928 Nicollet Ave. Minneapolis, Minn.

On May 10th 1935 ticket # 29442 delivered miscellaneous fixtures to 102 W. Washington St., Bloomington, Ill.

On May 2nd 1935 ticket # 29365 delivered miscellaneous merchandise to 103 N. Federal St. Mason City, Iowa.

On April 25th 1935 ticket # 29271 delivered miscellaneous household goods to 5610 W. Vernon Ave., St. Louis, Mo.

Above checked against original delivery tickets. 11/11/36

/s/ J. G. Petritz

[fol. 488]

Contract for Hauling

1. This agreement made and concluded at Chicago, Illinois, this 16 day of September 1935, by and between Andrew G. Nelson D/B/A Nelson Warehouse & Express Company hereinafter called the hauler, and Walgreen & Company hereinafter called the shipper,

WITNESSETH:

2. The hauler hereby agrees to make delivery of merchandise for the period of one (1) year from this date, renewable annually for the same period, unless otherwise cancelled.

3. The hauler agrees to secure license from the Public Utilities Commission, if necessary (providing there is a public Utilities Commission in any of the States where hauling is done) and to comply with all the laws, rules and regulations of the said Public Utilities Commission regarding hauling.

4. Schedule of rates shown in Exhibit A attached hereto and made a part hereof.

5. It is mutually agreed and understood that werever the shipper has a standard wagon scale, the actual weight of merchandise on each truck load will be arrived at by

use of such scale, then the hauler hereby agrees to accept the weights of all merchandise handled by him in accordance with the standard weight chart as set up by the shipper.

6. The hauler agrees that in the event that he fails to maintain schedule of delivery, then the shipper has the right to have his merchandise delivered by a third party and the hauler will pay the shipper for any difference between the third party's rate for making such delivery and the hauler's regular contract for such delivery.

7. The hauler further agrees that every service to be performed and every liability incurred in connection with the hauling, shall be subjected to all conditions whether printed or written herein contained.

8. The hauler hereby agrees that in case any accident or other delay occurs on the road, which would make it impossible for him to make delivery to the store, he will telephone or wire the shipper's office within thirty minutes after such accident or delay occurs.

9. It is further understood and agreed that the hauler will at all times carry public liability and property damage and workman's compensation insurance with reliable companies or with the State, whichever is legal, such coverage to be on the hauler's employees and his conveyances and will produce such policies for inspection when requested to do so by the shipper.

10. It is further agreed and understood that the hauler will reimburse the shipper for any loss, damage or shortage on such merchandise, including frozen perishables, transferred or under his control, and the shipper may make deduction for the amount of such loss or damage from the hauler's invoice. The hauler further agrees that he will give a receipt for all merchandise turned over to him at the shipper's dock.

[fol. 489] 11. It is further agreed and understood that the hauler hereby voluntarily assumes all risk or accident to his person, agent or property or to the person, agent or property of others and hereby releases and discharges the shipper from every claim, liability or demand of any kind, for or on account of any personal injury or damage of any kind sustained by him or by any of his employees or to others, and in the event that the shipper is sued or made defendant in suit for any action arising out of the negligence or accident of the hauler or his agent, either jointly or severally the hauler hereby agrees to defend and reimburse them for accidents and defense on account of said suit or suits.

12. It is further understood and agreed that the hauler and his organization will always conduct their operation in a manner which will not cause any inconvenience or offense to the patrons of the shipper and the hauler further agrees that he will instruct his organization to refrain from any disputes or controversies with the shipper's organization.

13. It is further understood and agreed that this contract may be cancelled by either party by giving the other party 10 days notice in writing, but unless so cancelled, this agreement is in effect for the period of one (1) year from date hereof, and is automatically renewed each year for the same period unless so cancelled.

14. The rate between shipper and hauler shall be $2.50 per hour.

IN WITNESS WHEREOF, the hauler and shipper have hereunto set their signatures.

NELSON WAREHOUSE & EXPRESS CO.

(signed) ANDREW G. NELSON
Walgreen Company Traffic Dept. Mgr.
(signed) W. E. HENRY

WITNESS

(signed) SYLVIA CARLSON
(signed) G. E. STEWART

The word "hauler" to be understood throughout this contract as including any person, partnership or corporation in possession of merchandise under this contract.

MF-I.C.C. No. 1

[fol. 490] ANDREW G. NELSON

doing business as

NELSON WAREHOUSE & EXPRESS CO.

(Contract motor carrier in interstate commerce)

SCHEDULE
of
MINIMUM RATES OR CHARGES

Between points within a radius of approximately 600 miles of Chicago, Illinois, in the states of Illinois, Indiana, Iowa, Michigan, Minnesota, Missouri, Nebraska, Ohio and Wisconsin.

ISSUED —March 30th, 1936.
EFFECTIVE—April 1st, 1936.

Andrew G. Nelson
Proprietor
1119 East 42nd Street,
Chicago, Illinois

Page 2.

[fol. 491]

SCHEDULE OF
MINIMUM RATES OR CHARGES

Between all points within a radius of approximately 600 miles of Chicago, Illinois, in the states of Illinois, Indiana, Iowa, Michigan, Minnesota, Missouri, Nebraska, Ohio and Wisconsin.

		Per hour
STORE FIXTURES MISCELLANEOUS MERCHANDISE HOUSEHOLD GOODS and FURNITURE	For truck and driver	$2.50
	For helpers—per man	$ .75

[fol. 494]

PERMIT

No. MC 1194*

ANDREW G. NELSON, INC.,
CHICAGO, ILLINOIS

At a Session of the INTERSTATE COMMERCE COMMISSION, Division 5, held at its office in Washington, D. C., on the 18th day of June, A. D., 1951

AFTER DUE INVESTIGATION, It appearing that the above-named carrier has complied with all applicable provisions of the Interstate Commerce Act, and the requirements, rules, and regulations prescribed thereunder, and, therefore, is entitled to receive authority from this Commission to engage in transportation in interstate or foreign commerce as a motor carrier; and the Commission so finding;

IT IS ORDERED, That the said carrier be, and it is hereby, granted this Permit as evidence of the authority of the holder to engage in transportation in interstate or foreign commerce as a contract carrier by motor vehicle; subject, however, to such terms, conditions, and limitations as are now, or may hereafter be, attached to the exercise of the privileges herein granted to the said carrier.

IT IS FURTHER ORDERED, That the transportation service to be performed by the said carrier in interstate or foreign commerce shall be as specified below:

New and used store fixtures, new and used household goods, and stock in trade of drug stores, over irregular routes,

Between points in Illinois, Indiana, Iowa, Kentucky, Michigan, Minnesota, Missouri, Nebraska, Ohio, and Wisconsin.

AND IT IS FURTHER ORDERED, That this permit shall be effective from the date hereof and shall remain in effect until suspended, changed, or revoked as provided in said Act.

By the Commission, division 5.

/s/ W. P. BARTEL,
Secretary.

(SEAL)

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* This permit embraces the operating rights in Permit No. MC 1194, issued March 13, 1942, acquired by carrier herein pursuant to MC-FC 53070.

[fol. 495] PLAINTIFF'S EXHIBIT No. 4

ANDREW G. NELSON, INC.

Schedule of Gross Income and Profits or Losses For Months Ending October 31, 1954 to December 31, 1955 Inclusive

	Adjusted Gross Income	Net Profit Operations or	Net Profit Other Income	Net Profit After Income Tax
October 31, 1954	$ 63611.24	$ 5432.68	$ 8583.81	$5183.81
November 30, 1954	$ 53578.64)			
	)	($ 3926.94)	($ 3914.71)	($ 614.71)
December 31, 1954	$ 52055.13)			
January 31, 1955	$ 62939.55	$ 5089.76	$ 5406.88	$3806.88
February 28, 1955	$ 61180.55	$ 6237.96	$ 6374.54	$4474.58
March 31, 1955	$ 67057.70	$ 474.04	$ 597.80	$ 397.80
April 30, 1955	$ 75259.75	$ 6336.03	$ 6576.16	$4676.16
May 31, 1955	$ 82378.17	$ 1874.03	$ 2102.49	$1502.49
June 30, 1955	$ 69792.48	($ 5234.44)	($ 5177.51)	($3677.51)
July 31, 1955	$ 67338.38	$ 1293.04	($ 934.36)	$ 158.68
August 31, 1955	$ 77912.69	$ 2092.40	$ 2175.41	$1525.41
September 30, 1955	$ 67430.50	$ 121.33	$ 312.44	$ 283.77
October 31, 1955	$ 63186.93	$ 3306.07	$ 3327.99	$2427.99
November 30, 1955	$ 47349.12	($ 77.29)	$ 102.29	$ 102.29
December 31, 1955	$ 39810.17	($ 9841.86)	($ 9520.15)	($6677.23)
Total	$952881.00	$13276.81	$16013.08	$9763.53

( ) Indicates Loss

[fol. 498] UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

Civil Action No. 55-C-2302

ANDREW G. NELSON, INC., Plaintiff,

v.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, Defendants,

and

ADVANCE TRANSPORTATION CO., INC., et al., Intervening Defendants.

MEMORANDUM OPINION—June 13, 1956

Before Finnegan, Circuit Judge, and La Buy and Perry, District Judges.

Finnegan, Circuit Judge. Andrew G. Nelson, Inc., plaintiff, invoked a statutory three-judge district court (28 U.S.C. § 1336, § 2284, §2325) to enjoin and annul a cease and desist order of the Interstate Commerce Commission, dated March 3, 1955, in Docket No. MC-C-1610, reported in 63 M.C.C. 407 (1955). The challenged order is a culmination of hearings initiated by the Commission under § 204(c) and § 212(a) of the Interstate Commerce Act,[1] to investigate plaintiff's operations under its permit, issued June 18, 1951, authorizing the transportation, over irregular routes of: "(N)ew and used store fixtures; new and used household goods and stock in trade of drugstores." By its own initial order the Commission made this corporate plaintiff a respondent in those proceedings instituted for the purpose of determining whether Andrew G. Nel- [fol. 499] son, Inc., is and was engaged in the transportation of commodities outside the scope of its operating authority, in violation of § 209(a) of the Act,[2] or "of any requirement, restriction, term, or condition of . . . (its) permit . . ." From the record made before the Commission it is established that the plaintiff corporation was represented by several counsel during an adversary proceeding before an examiner, at which other attorneys appeared on behalf of several intervenors.

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[1] 49 U.S.C. § 304(c), 54 Stat. 922, as amended September 18, 1940; 49 U.S.C. 312(a), 54 Stat. 924, as amended Sept. 18, 1940.

[2] 49 U.S.C. § 309(a)(1), 64 Stat. 575, as amended Sept. 1, 1950.

Earlier, in March, 1942, under No. MC1194, plaintiff's predecessor, Andrew G. Nelson, an individual, had been authorized by the Commission to conduct business as a contract carried by motor vehicle the commodities mentioned and already quoted above in connection with the June, 1951, permit. Nelson's 1942 permit (No. MC1194) was issued under the "grandfather" clause in the first proviso of § 209(a)(1), Part II, of the Act. Later, sometime in 1951, Nelson incorporated and with Commission approval his permit was transferred to the corporate plaintiff before us.

Plaintiff participated in the challenged administrative proceedings held by the Commission during which the Bureau of Inquiry and Compliance, Interstate Commerce Commission, introduced evidence establishing that during a period in 1953 this carrier transported in interstate commerce, commodities from consignors, none of whom were drugstores, to consignees "whose business is as indicated. Numerous and varied canned or packaged grocery items to grocery stores or warehouses; dry and liquid cream and fruit juices to food manufacturers; beer and wines to liquor distributors; 100-pound bags of dry glue to a company whose business is not stated of record; candy to a candy wholesale candy distributor; dry milk to a distributor of that product; malted milk powder and milk food to a manufacturer of drugs and dietetic foods; and automobile bat- [fol. 500] teries to a general merchandising company . . ." 63 M.C.C. 407, 412.

Proceeding before us by way of a complaint for a declaratory judgment, plaintiff asks, in substance, that we review the Commission's order by measuring it with constitutional yardsticks. No problem of exhausting administrative remedies is involved. Plaintiff insists that by its order, now in issue, the Commission whittled down the operating permit originally issued under the "grandfather clause." But the

Commission was investigating plaintiff's compliance or non-compliance with permit No. MC 1194, as is disclosed *inter alia* by this statement reported by the Examiner:

> "The sole issue herein is thus explicit and requires a determination of the extent of the authority granted by the commodity description '*stock* in trade of drugstores.' None of the parties claim that such description is patently ambiguous, and ambiguity may not be assumed merely from the fact that the Bureau and interveners are in disagreement with respondent as to the meaning of the description. In considering the issue thus presented neither the operations of respondent prior to the 'grandfather' date, nor the Commission's intentions with respect thereto in issuing the permit, are of any importance."

When the matter moved up to the level of Division 5 it was pointed out, (63 M.C.C. 407, 409): "(W)e agree with the contention of the parties and the examiner's conclusions that there is no such patent ambiguity in the permit as to warrant our going back of it and giving consideration to events prior to its issue." We think the Commission acted within its statutory power and for that reason refuse to disturb the challenged order.

Having examined the pleadings, exhibits, record made before the Commission, after hearing oral arguments of counsel for both sides, receiving evidence on the matter of damages, and being fully advised in the premises, we find and conclude as follows:

[fol. 501]

FINDINGS OF FACT

1. Plaintiff, Andrew G. Nelson, Inc., an Illinois corporation, operates as a motor contract carrier in ten North Central States under authority of Permit No. MC 1194, which was issued on March 13, 1942, by the Interstate Commerce Commission (hereinafter called "the Commission") to plaintiff's predecessor in interest (Andrew G. Nelson, as individual), and was authorized to be transferred to plaintiff by order dated March 12, 1951. A new permit was issued to plaintiff on June 18, 1951.

2. The aforesaid permits authorized plaintiff and its predecessor to transport *new and used store fixtures, new and used household goods,* and *stock* in trade of drug stores.

3. Pursuant to said application, the Interstate Commerce Commission in its Docket MC–1194, under date of February 14, 1938, issued its so-called compliance order reciting in part as follows:

> "After due investigation:
>
> "It appearing, That applicant in accordance with the requirements of Section 209, Motor Carrier Act, 1935, including due service, made application for a permit to operate as a contract carrier by motor vehicle according to the specification *set forth as appended on the reverse side hereof or attached hereto,* and made a part of this order, and that the said applicant or predecessor in interest was in bona fide operation in such manner on July 1, 1935, and has so operated since that time; and the Commission so finding;"

The specification set forth on the reverse side of said compliance order and referred to in the foregoing quotation of said order reads as follows:

> "The business of applicant, as authorized by the order of which this is a part, in interstate or foreign commerce as a contract carrier by motor vehicle of the commodities indicated, over irregular routes, is as specified below:
>
> *New and used store fixtures, new and used household* goods, and *stock* in trade of drug stores.
>
> [fol. 502] Between points and places in Illinois, Indiana, Iowa, Kentucky, Michigan, Minnesota, Missouri, Nebraska, Ohio, and Wisconsin."

The foregoing finding of the Commission made in said compliance order of February 14, 1938, has never been changed and remains in effect.

4. The Interstate Commerce Commission issued to Andrew G. Nelson under date of March 13, 1942, a permit to

engage in interstate or foreign commerce as a contract carrier by motor vehicle, a portion of which permit reads as follows:

> "IT IS FURTHER ORDERED, That the transportation service to be performed by the said carrier in interstate or foreign commerce shall be as specified below:
>
> > *New and used store fixtures, new and used household* goods, and *stock* in trade of drug stores, over irregular routes,
> >
> > Between points and places in Illinois, Indiana, Iowa, Kentucky, Michigan, Minnesota, Missouri, Nebraska, Ohio, and Wisconsin."

5. That the aforesaid permit dated March 13, 1942, was transferred to plaintiff in the manner and form required by law, and the Interstate Commerce Commission on June 18, 1951, reissued such permit to plaintiff making no change therein except the substitution of plaintiff's name for the name of the original holder.

6. Plaintiff is and has been since 1951 engaged in the transportation of commodities in Interstate Commerce as a contract carrier, pursuant to authority granted by said permit.

7. By order entered January 21, 1954, the Commission, Division 5, instituted an investigation proceeding in its Docket No. MC–C–1610 with a view to determining whether Andrew G. Nelson, Inc., is and has been engaged in the transportation of commodities not within the scope of its operating authority, in violation of section 209(a)(1) of the Interstate Commerce Act (49 USC § 309(a)(1)), or of any requirement, restriction, term, or condition of its permit. The order further provided for the issuance of such orders and the taking of such other action as the facts and circumstances may appear to warrant.

[fol. 503] 8. A hearing was held by a hearing examiner of the Commission in May, 1954, at Chicago, Illinois.

9. The Bureau of Inquiry and Compliance of the Commission was joined in its support of the investigation by

19 motor carriers, 3 associations of motor carriers, and the Class I rail carriers in western territory.

10. During the period July 31, 1953, to December 7, 1953, the respondent transported in interstate commerce the following commodities from consignors, none of whom were drugstores, to the consignees whose business is as indicated: Numerous and varied canned or packaged grocery items to grocery stores or warehouses; dry and liquid cream and fruit juices to food manufacturers; beer and wines to liquor distributors; 100-pound bags of dry glue to a company whose business is not stated of record; candy to a wholesale candy distributor; dry milk to a distributor of that product; malted milk powder and milk food to a manufacturer of drugs and dietetic foods; and automobile batteries to a general merchandising company.

11. Plaintiff did not deny that it had engaged in the aforesaid transportation, but contended that the description "*stock* in trade of drug stores" permits transportation from and to any consignor and consignee, provided that the commodities transported are the same as those sold in drug stores.

12. The hearing examiner held that this argument was without merit because it was based on the false premise that the plaintiff's permit authorizes the transportation of "commodities described as stock in trade of drug stores." The hearing examiner further found that the commodity description under consideration is merely a different but equally effective manner of stating "drugstores' *stock* in trade"; that the limitation as thus imposed by the com- [fol. 504] modity description is not restricted to deliveries to drugstores but also includes goods which are earmarked for eventual delivery to and sale in a drugstore; and that, accordingly, plaintiff's past and continued transportation in excess of that granted by its permit, as described in Finding of Fact 6, is in violation of section 209(a)(1) of the act and should be discontinued immediately.

13. The hearing examiner further held that there is no such patent ambiguity in the commodity description "*stock*

in trade of drugstores" in the permit as to warrant consideration of events prior to issuance to plaintiff's predecessor.

14. The examiner served his recommended report and order, proposing the issuance of a cease and desist order, on September 22, 1954.

15. Plaintiff filed exceptions to the examiner's recommended report and order on October 29, 1954.

16. The Commission, Division 5, issued its report (63 M.C.C. 407) on March 17, 1955, in which it found that, except as modified in its report, the examiner had adequately stated the facts and the issues, and it adopted his report and findings except as modified.

17. In ruling against plaintiff's exceptions and upholding the hearing examiner, Division 5, found that there is no such patent ambiguity in the permit as to warrant giving consideration to events prior to its issuance; that the examiner's statement and discussion of the issue is sound as regards the phrase "*stock* in trade of drugstores"; that the term "*new and used store fixtures*" is adequately defined in *Shelinsky Common Carrier Application*, 52 M.C.C. 349, at 359 and in *Mural Trucking Service Interpretation of Certificate*, 63 M.C.C. 47; that plaintiff's contention with respect to the meaning of "*household goods*" is totally without merit; that any article which is a part of the stock in trade of a mercantile establishment does not for that rea- [fol. 505] son come within the meaning of "household goods," except as an incident of the movement of such establishment from one location to another, citing Commission decisions; that no inconsistency exists between the "intended use" test and the examiner's statement that "*stock* in trade of drugstores" means stock kept for sale purposes by one who operates a drugstore; that the equivalent of "*stock* in trade of drugstores" is "drugstores' stock in trade"; that the important determination is what transportation was intended to be authorized; that plaintiff is authorized to transport the commodities described in its permit provided such commodities at the time of shipment are definitely intended for use as "store fixtures, household

goods, or stock in trade of drugstores"; that the commodity limitation in plaintiff's permit does not limit the class or type of persons with whom it may contract, as would a "Keystone" restriction as described in *Keystone Transp. Co., Contract Carrier Application* 19 M.C.C. 475; that the "intended use" test has never been abandoned by the Commission; and that an appropriate order requiring plaintiff to cease and desist from the operations found to be unauthorized would be entered.

18. On March 17, 1955, the Commission issued its order requiring plaintiff to cease and desist from the operations found in the report of Division 5 to be unauthorized and unlawful.

19. Plaintiff filed a petition for reconsideration and oral argument on May 11, 1955; replies to the petition were filed on June 15, 1955; and the entire Commission denied the petition by order of November 15, 1955.

20. The Court adopts as its own the findings of fact made by the Commission, Division 5, as shown in its report on March 17, 1955.

CONCLUSIONS OF LAW

1. The Commission had jurisdiction to hear and determine the issues involved in the proceeding which resulted in the order here under attack.

2. This Court has jurisdiction of the action herein and the parties hereto.

[fol. 506] 3. The plaintiff was accorded a full, fair and legal hearing.

4. The findings made by the Commission, Division 5, as set forth in its report of March 17, 1955, which the Court had adopted as its own, are supported by substantial evidence of record and are adequate to support the order issued by the Commission.

5. The Commission did not exceed its authority in issuing its said order.

6. The order of the Commission under attack in this cause is a legal and valid order.

7. The injunction prayed for by the plaintiff should be denied and the suit dismissed.

8. Let a decree be entered in accordance with the conclusions expressed herein.

Dated: 13th day of June, 1956.

Philip J. Finnegan, United States Circuit Judge,
Walter J. La Buy, United States District Judge.

[fol. 508] UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

No. 55 C 2302

ANDREW G. NELSON, INC., Plaintiff,

v.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, Defendants,

and

ADVANCE TRANSPORTATION CO., INC., et al., Intervening Defendants.

DISSENTING MEMORANDUM OPINION—June 13, 1956

Judge Perry, dissenting:

In the proceedings initiated by the Interstate Commerce Commission and ending in the cease and desist order dated March 3, 1955, herein sought to be enjoined and annulled, the Commission, in effect, sought to modify or curtail by retroactive interpretation the permit of plaintiff corporation, an interstate motor contract carrier and successor in interest to Andrew G. Nelson whose permit was issued under the "grandfather" clause in the first proviso to Section 209(a)(1) of the Interstate Commerce Act (49 U.S.C. 309(a)(1)).

The so-called "grandfather" clause reads, in part, as follows:

> "Except as otherwise provided in this section and in section 310a of this title, no person shall engage in the business of a contract carrier by motor vehicle in interstate or foreign commerce on any public highway . . . unless there is in force with respect to such carrier a permit issued by the Commission, authorizing such person to engage in such business: *Provided,* That, subject to section 310 of this title, if any such carrier or a predecessor in interest was in bona fide operation as a contract carrier by motor vehicle on July 1, 1935, over the route or routes or within the [fol. 509] territory for which application is made and has so operated since that time . . . the Commission shall issue such permit, without further proceedings, if application for such permit was made to the Commission as provided in sub-section (b) of this section . . ."

By its order of February 14, 1938 in "grandfather" case No. MC–1194, the Interstate Commerce Commission found that Andrew G. Nelson (plaintiff's predecessor) had made application for a permit to operate as a contract carrier by motor vehicle according to certain specifications, viz:

> "The business of applicant, as authorized by the order of which this is a part, in interstate or foreign commerce as a contract carrier by motor vehicle of the commodities indicated, over irregular routes, is as specified below:
>
> New and used store fixtures, new and used household goods, and stock in trade of drug stores.
>
> Between points and places in Illinois, Indiana, Iowa, Kentucky, Michigan, Minnesota, Missouri, Nebraska, Ohio, and Wisconsin",

and then the Order added: "and that the said applicant or predecessor in interest was in bona fide operation *in such manner* (italics supplied) on July 1, 1935, and has so operated since that time; and the Commission so finding." That finding has never been changed, and remains in effect. In other words, the Commission's finding of fact was that the business of applicant during the "grandfather" period had been as a contract carrier of commodities described as new and used store fixtures, new and used household goods, and stock in trade of drug stores.

Now, let us turn to a consideration of some of the informational data that was on file in 1936 as a part of the record before the Commission in the "grandfather" case; data describing applicant's operations during the "grandfather" period, and on which, in part, at least, the Commission presumably based its administrative finding of fact [fol. 510] in the order of February 14, 1938, just mentioned. Referring to plaintiff's exhibits, put into evidence herein by agreement of attorneys, we find certified, photostatic copies of the following documents:

> (a) "Property Carrier Application" dated December 30, 1935 and made by Andrew G. Nelson. An exhibit, attached to and a part of the Application, contains the following statement by applicant:
>
> "Operations involve transportation over various routes, between various municipalities, on various highways, of store fixtures and miscellaneous merchandise, and household goods of employes, for Walgreen Co., in connection with the opening, closing and remodeling of stores."
>
> (b) Statements made by Andrew G. Nelson when he appeared before Supervisor John G. Petritz on November 9, 1936, and reduced to writing and signed by him on November 11, 1936—paragraphs 7 and 8 whereof read as follows:
>
> "7. That he is an interstate contract carrier of property for the Walgreen Company and for it alone.
>
> "8. That he hauls to and from Walgreen Retail Stores located within 600 miles of Chicago. That said transportation has to do with the opening, the remodeling, and/or the closing of Walgreen retail stores, the commodities so transported are usually store fixtures and equipment and merchandise for the opening stock. That the household goods hauled are only for employees of the Walgreen Company and that payment for said transportation is taken care of by the Wal-

green Company. This movement amounts to approximately ten trips per year. That his equipment usually returns empty, except for old store fixtures and equipment and occasionally a transfer of stock for Walgreen Company."

(c) Affidavit, dated November 12, 1935, of W. E. Henry who states that he "is now, and has been for a number of years, engaged in the occupation of traffic manager for Walgreen . . . and that as such traffic manager it is his duty to, among other things, arrange and contract for, and order and supervise, the transportation of store fixtures and miscellaneous merchandise belonging to said Walgreen Co., and household goods of certain of said company's employes."

Affiant Henry further says "that Andrew G. Nelson . . . is on this date, and has been continuously since the year A.D. 1919, under contract with said Walgreen Co., to transport by motor vehicle over various routes, between various municipalities, on various highways, [fol. 511] store fixtures and miscellaneous merchandise, and household goods of employes, for Walgreen Co., in connection with the opening, closing and remodeling of stores, all over such state and federal highways within a radius of approximately six hundred (600) miles from Chicago, Illinois, as may be necessary to reach a Walgreen Co., drug store.

(d) Affidavit, dated November 10, 1936, of David Harding who states that he "is now and has been since 1920 engaged in the occupation of warehouse foreman for Andrew G. Nelson. . . . That it is his duty among other things to check loads, supervise the transportation of store fixtures, miscellaneous merchandise and household goods belonging to Walgreen Company or their employees."

Affiant Harding further says "that he has ordered the various motor vehicles over various routes . . . containing store fixtures, miscellaneous merchandise and household goods belonging to Walgreen Company or their employees, in connection with the opening, closing and remodeling of stores. . . . Affiant further deposes and says the type of business done by Andrew G. Nelson . . . has not materially changed since his employment in 1920.

(e) Affidavit, dated November 10, 1936, of Jacob Jacoby who states that "he is now and has been since 1930 engaged in the occupation of chauffeur for Andrew G. Nelson, doing business as Nelson Warehouse & Express Co. . . . That it is his duty among other things to drive various vehicles containing store fixtures, miscellaneous merchandise and household goods belonging to Walgreen Company or their employees.

Affiant Jacoby further states "that he has driven various motor vehicles over various routes . . . containing store fixtures, miscellaneous merchandise and household goods belonging to Walgreen Company or their employees, in connection with the opening, closing and remodeling of stores . . . and says the type of business done by Andrew G. Nelson as Nelson Warehouse & Express Co. . . . has not materially changed since his employment in 1930.

(f) Affidavit, dated November 10, 1936, of Robert Stewart who states that "he is now and has been since 1930 engaged in the occupation of chauffeur for Andrew G. Nelson, doing business as Nelson Warehouse & Express Co. . . . That it is his duty among other things to drive various vehicles containing store fixtures, miscellaneous merchandise and household goods belonging to Walgreen Company or their employees. . . .

Affiant Stewart further states that he has "driven various motor vehicles over various routes, between various municipalities . . . containing store fixtures, miscellaneous merchandise and household goods belonging to Walgreen Company or their employees, in [fol. 512] connection with the opening, closing and remodeling of stores all over such states and federal highways within the radius of approximately six hundred (600) miles from Chicago, Illinois . . . that the type of business done by Andrew G. Nelson as Nelson Warehouse & Express Co. . . . has not materially changed since his employment in 1930.

Applicant Nelson, having established the fact that he was in bona fide operation as a contract carrier by motor vehicle on July 1, 1935, and having been accordingly issued a permit by the Commission pursuant to the "grandfather" clause, was granted by statute the right and authority to continue the grandfather operations in the same pattern. The Commission has no more authority or power now to specify, limit or diminish the scope of the operations authorized under the "grandfather" permit here involved than it had in 1942 when the permit was issued.

To permit the Commission to modify or restrict by retroactive interpretation a permit issued under circumstances such as those in the instant case would be to give the permit a protean quality, subjecting the holder thereof to possible deprivation of property without due process.

The power given the Interstate Commerce Commission by Congress to make regulations is one which is limited to the enforcement and application of the statute and to the carrying into effect of the will of Congress as expressed by the statute. It was never intended that the Commission be authorized to usurp the legislative function of Congress in any manner—whether it be done directly, by the promulgation of regulations which are not in harmony with the statute, or done indirectly by an interpretation of the statute, amounting to an amendment thereof. In the case at hand the Commission is, in effect, amending the statute. [fol. 513] Absent any charge and supporting proof of fraud in the inducement of the issuance of a permit, the findings of the Commission in the "grandfather clause" proceedings here involved were and are final and cannot be changed or modified; nor can new and different findings be made, based upon the same facts.

Joseph Sam Perry, United States District Judge.

[fol. 515] IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

Civil Action No. 55 C 2302

ANDREW G. NELSON, INC., Plaintiff,

v.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, ET AL., Defendants.

FINAL JUDGMENT AND DECREE—June 13, 1956

The above entitled action having come on for final hearing before a duly constituted district court of three judges convened pursuant to Sections 2284 and 2325 of Title 28, United States Code, and the Court having considered the pleadings and evidence, and the arguments and briefs of counsel, and the Court being fully advised in the premises and having filed its Findings of Fact and Conclusions of Law in said Action, in accordance with the said Findings of Fact and Conclusions of Law, it is hereby

Ordered, Adjudged and Decreed, that the relief prayed for in the complaint be, and it is hereby denied, and the complaint is dismissed.

Dated this 13th day of June 1956.

Philip J. Finnegan, United States Circuit Judge.
Walter J. La Buy, United States District Judge.

[fol. 517] IN THE UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

Civil Action No. 55 C 2302

ANDREW G. NELSON, INC., Plaintiff,

v.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, Defendants,

and

ADVANCE TRANSPORTATION CO., INC., et al., Intervening Defendants.

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES—Filed July 2, 1956

I. Notice is hereby given that Andrew G. Nelson, Inc., the Plaintiff above named, hereby appeals to the Supreme Court of the United States from the final judgment and decree denying the relief prayed for in the complaint and dismissing the complaint entered in this action on June 13, 1956.

This appeal is taken pursuant to Title 28, U.S.C. Section 1253.

II. The Clerk will please prepare the transcript of the record in this cause for transmission to the Clerk of the Supreme Court of the United States, and include in said transcript the following:

Complaint with Exhibits A to G, inclusive thereto attached.

Answer of Interstate Commerce Commission.

Answer of Defendant, United States of America.

Petition of Intervention and Answer to Complaint by Intervenors.

Application for Convening of three-judge District Court.

Designation by Chief Judge, United States Court of Appeals, 7th Circuit, of judges to constitute three-judge District Court.

Plaintiff's Exhibit No. 1 admitted in evidence on March 7, 1956, being the entire record before the Interstate Commerce Commission, certified by the Commission in its Docket MC C 1610.

[fol. 518] Plaintiff's Exhibit No. 2 admitted in evidence on March 7, 1956, being the entire record certified by the Interstate Commerce Commission in its proceeding MC C 1194.

Plaintiff's Exhibit No. 3 admitted in evidence on March 7, 1956, being a certified copy of plaintiff's permit issued by the Commission in 1951.

Plaintiff's Exhibit No. 4 admitted in evidence on March 7, 1956.

Plaintiff's Exhibit No. 5 admitted in evidence on March 7, 1956.

Entire transcript of all testimony taken before the Court on March 7, 1956.

Memorandum of Opinion, Findings of Fact, and Conclusions of Law Signed by Judges Philip J. Finnegan and Walter J. La Buy.

Dissenting Memorandum Opinion of Judge Joseph Sam Perry.

Final Judgment and Decree entered June 13, 1956.

This Notice of Appeal.

III. The following questions are presented by this appeal:

1. Whether the Interstate Commerce Commission had any jurisdiction or power or authority to change, restrict, limit or affect rights granted to plaintiff by Section 209(a), Part II, of the Interstate Commerce Act, under the guise of interpretation or otherwise.

2. Whether Section 209(a) of Part II of the Interstate Commerce Act imposed a duty upon the Interstate Commerce Commission to issue to a motor carrier in bona fide operation on July 1, 1935 a permit commensurate with the findings of the Interstate Commerce Commission as to what such motor carrier's business was on July 1, 1935.

3. Whether the Findings of Fact made by the Interstate Commerce Commission on February 14, 1938 concerning the business of plaintiff's predecessor on July 1, 1935 are final and binding, and not subject to change or modification by the Interstate Commerce Commission in a different and subsequent proceeding, under the guise of interpretation or otherwise.

4. Whether plaintiff's operating permit as a motor carrier must be considered to incorporate the Interstate Com- [fol. 519] merce Commission's established definitions of terms contained therein which were in effect at the time said permit was issued, or whether the Interstate Commerce Commission may now revise plaintiff's permit retroactively in accordance with policies of the Commission adopted or originated long after plaintiff's permit was issued.

5. Whether the report and order of the Interstate Commerce Commission made on March 17, 1955 which is the subject of this litigation, meet the requirements of the Administrative Procedure Act (Title 5 U.S.C., Sec. 1001 et seq.).

6. Whether the report and order of the Interstate Commerce Commission of March 17, 1955 are so arbitrary, capricious and unreasonable that they must be set aside, and whether said report and order are so vague, indefinite and confusing as to be susceptible to neither compliance nor enforcement, and must for that reason be set aside.

7. Whether the Interstate Commerce Commission properly transferred to plaintiff the burden of proving itself innocent of charges brought against it by a Bureau of the Commission.

8. Whether plaintiff was afforded a fair and impartial hearing by the Interstate Commerce Commission.

9. Whether plaintiff's motor carrier permit is or is not ambiguous, and whether the Interstate Commerce Commission did or did not and should or should not have given consideration to evidence as to the "grandfather" business of plaintiff's predecessor.

10. Whether the order of the Interstate Commerce Commission herein challenged deprives plaintiff of property without due process of law.

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[fol. 520] PROOF OF SERVICE (omitted in printing).

[fol. 524] CLERK'S CERTIFICATE TO FOREGOING TRANSCRIPT (omitted in printing).

[fol. 525] SUPREME COURT OF THE UNITED STATES

ORDER NOTING PROBABLE JURISDICTION—November 13, 1956

Appeal from the United States District Court for the Northern District of Illinois.

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted and the case is transferred to the summary calendar.

November 13, 1956

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IN THE

Supreme Court of the United States

October Term, 195~~6~~7

No. ~~366~~ 12

ANDREW G. NELSON, INC.,
Appellant,

vs.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, ADVANCE TRANSPORTATION CO., INC., et al.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS.

JURISDICTIONAL STATEMENT.

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Edward W. Rothe,
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IN THE

Supreme Court of the United States

October Term, 1956.

No.............

ANDREW G. NELSON, INC.,

Appellant,

vs.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, ADVANCE TRANSPORTATION CO., INC., ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS.

JURISDICTIONAL STATEMENT.

OPINIONS BELOW.

The opinion of the Interstate Commerce Commission, is reported at 63 M. C. C. 407 and is set forth in Appendix A, *infra*, pp. 27-41.

The opinion of the United States District Court for the Northern District of Illinois is as yet unreported. The court's memorandum opinion, including findings of fact and conclusions of law, is set forth in Appendix C, *infra*, pp. 43-52. Judge Perry's dissenting memorandum opinion is set forth in Appendix D, *infra*, pp. 53-59.

JURISDICTION

1. This is an action to enjoin, set aside, annul and suspend an order of the Interstate Commerce Commission (Appendix B, *infra*, p. 42, brought under Sections 1336 and 2325 of Title 28 of the United States Code. (28 U. S. C. 1952 ed., Secs. 1336 and 2325.)

2. The judgment of the district court, sought to be reviewed, was dated and entered on June 13, 1956. (Appendix E, *infra*, p. 60.) Notice of appeal was filed in the United States District Court for Northern District of Illinois (Eastern Division) on July 2, 1956.

3. Jurisdiction to hear this appeal is conferred on this Court by Section 1253 of Title 28 of the United States Code (28 U. S. C. 1952 ed., Sec. 1253.)

4. The following cases sustain the jurisdiction of this Court to entertain a direct appeal from an order of a district court of three judges denying an injunction against the operation of an order of the Interstate Commerce Commission:

American Trucking Association v. *United States*, 326 U. S. 77.

Alabama Great Southern Railway Co. v. *United States*, 340 U. S. 216.

American Trucking Association v. *United States*, 344 U. S. 298.

STATUTES INVOLVED.

Interstate Commerce Act, Part II (Act of August 9, 1935, c. 498, 49 Stat. 543):[1]

> Sec. 209. (a) No person shall engage in the business of a contract carrier by motor vehicle in interstate or foreign commerce on any public highway or within any reservation under the exclusive jurisdiction of the United States unless there is in force with respect to such carrier a permit issued by the Commission, authorizing such person to engage in such business: *Provided*, That, subject to section 210, if any such carrier or a predecessor in interest was in *bona fide* operation as a contract carrier by motor vehicle on July 1, 1935, over the route or routes or within the territory for which application is made and has so operated since that time, * * * the Commission shall issue such permit, without further proceedings, if application for such permit is made to the Commission as provided in paragraph (b) of this section and within one hundred and twenty days after this section shall take effect and if such carrier was registered on July 1, 1935, under any code of fair competition requiring registration, the fact of registration shall be evidence of bona fide operation to be considered in connection with the issuance of such permit. (49 U. S. C. 1952 ed. Sec. 309.)

Administrative Procedure Act (Act of June 11, 1946, c. 324, 60 Stat. 237):

> Sec. 8. In cases in which a hearing is required to be conducted in conformity with section 7—

* * * * *

(b) SUBMITTALS AND DECISIONS.

* * * * *

> All decisions * * * shall become part of the record and include a statement of (1) findings and conclusions, as well as the reasons or basis therefor, upon all the

---

[1] Originally cited as the Motor Carrier Act, 1935.

material issues of fact, law, or discretion presented on the record * * *. (5 U. S. C. 1952 ed., Sec. 1007.)

Sec. 10.

* * * * *

(e) SCOPE OF REVIEW.—So far as necessary to decision and where presented the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of any agency action. It shall * * * (B) hold unlawful and set aside agency action, findings, and conclusions found to be (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) contrary to constitutional right, power, privilege, or immunity; (3) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (4) without observance of procedure required by law; (5) unsupported by substantial evidence in any case subject to the requirements of sections 7 and 8 or otherwise reviewed on the record of an agency hearing provided by statute; or (6) unwarranted by the facts to the extent that the facts are subject to trial *de novo* by the reviewing court. In making the foregoing determinations the court shall review the whole record or such portions thereof as may be cited by any party, and due account shall be taken of the rule of prejudicial error. (5 U. S. C. 1952 ed., Sec. 1008.)

QUESTIONS PRESENTED.

I. Whether or not the contract carrier by motor vehicle grandfather permit granted to appellant's predecessor gave him *all* of the rights to which he was entitled under Section 209(a) of Part II of the Interstate Commerce Act.

A. If so, does the Commission's cease and desist order wrongfully restrict the scope of the operations authorized by that permit because of an erroneous interpretation of its language, arrived at through the application of (1) erroneous canons of interpretations and (2) subtle definitions originated by the Commission long after the permit was granted?

B. If not, may the Commission now deprive appellant of operating rights guaranteed by Section 209(a) simply because the language used by the Commission in granting the permit failed to describe the full scope of the grandfather operations?

II. Whether or not the Commission's report should be set aside for lack of findings and conclusions with respect to all material issues of fact and law, with reasons and bases therefor, as required by Section 8(b) of the Administrative Procedure Act.

III. Whether or not the Commission's cease and desist order should be declared unlawful under Section 10(e) of the Administrative Procedure Act as being (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) in excess of its statutory limitations or short of appellant's statutory right; (3) entered without observance of procedure required by law; or (4) unsupported by substantial evidence.

STATEMENT.

On March 13, 1942, the Interstate Commerce Commission (hereinafter sometimes referred to as the Commission) issued to Andrew G. Nelson, doing business as Nelson Warehouse & Express Company, a motor contract carrier permit to transport, within a ten state area, the following commodities:

> "*New and used store fixtures, new and used household goods,* and *stock* in trade of drug stores."

In 1951, Nelson incorporated his business under the name Andrew G. Nelson, Inc., and on June 18, 1951, the Commission issued a new permit to the corporation (appellant herein), embracing the same operating rights as the old permit.

On January 21, 1954, the Commission ordered an investigation to determine whether or not appellant had been transporting various commodities (enumerating them) which were not within the scope of the commodity description of its operating permit.

The matter was referred to one of the Commission's examiners and a hearing was held at Chicago, Illinois in May of 1954. Various parties intervened to support the position of the Commission's Bureau of Inquiry and Compliance (hereinafter sometimes referred to as the Bureau).

At the hearing, appellant did not contest that it had, between July 31 and December 7, 1953, transported in interstate commerce for consignors (none of which was a drug store in the usual sense) the commodities in question to various consignees. On the other hand, the Bureau did not contest that the commodities transported do constitute part of the stock in trade of a drug store. Rather, the Bureau's position was that the so-called intended use theory applied in this case, so that those commodities could not be transported under appellant's authority to haul stock in trade of drug stores unless, when accepted for shipment, they were earmarked or intended for use as part of the stock in trade of a drug store. (Appendix A, *infra*, pp. 35-35.)

At the hearing, the Bureau's position was that the language of appellant's permit was ambiguous,[2] whereas appellant contended that the language was not ambiguous. After the hearing, however, the Bureau switched its position and decided that the language of the permit was not ambiguous. (Appendix A, *infra*, p. 30.) Nevertheless, during the hearing, both parties introduced documentary evidence and testimony relating to appellant's predecessor's (Nelson's) grandfather operations and relating to the events preceding the issuance of the permit. That evidence may be summarized, briefly, as follows:

Andrew G. Nelson started in the trucking business, under the name Nelson Warehouse & Express Company, in 1919. Between that time and 1935, when the Motor Carrier Act was passed, he hauled any and every kind of commodity, to any place, for anybody, for any price—all depending on what contracts he could get. He lost many of his customers in the early 1930's, when they went out of business because of the depression, but, in 1935, he still had some contracts and, most important, was still in the business of hauling anything, anywhere, for anybody who wanted his services. In fact, on August 24, 1934, he was granted a Certificate of Registration under the Code of Fair Competition for the Trucking Industry (established by the National Recovery

---

[2] The Commission has often stated that, in construing the extent of authority granted in a grandfather permit, evidence of the grandfather operations and other events preceding the issuance of the permit is admissible only if the language of the permit is ambiguous. See, for example, *P. Saldutti & Son, Inc., Interpretation of Permit*, 63 M. C. C. 593 (1955).

Act), in which he was described as an "anywhere for hire Member of the Trucking Industry."[3]

When the Motor Carrier Act was passed in 1935, Nelson went to the local office of the Commission's Bureau of Motor Carriers to see what he had to do to comply with the new law. There, his case was handled by a Mr. Petritz (deceased at the time of the hearing). Nelson and Petritz discussed the type of permit Nelson should apply for and Petritz advised him as to the way in which his application should be filled out. On January 2, 1936, Nelson submitted his application for a permit to transport "store fixtures, miscellaneous merchandise and household furniture" in interstate commerce as a contract carrier by motor vehicle. This application, together with certain exhibits attached thereto, give the impression that, as of July 1, 1935, Nelson had only one contract—with the Walgreen Company—to transport store fixtures and miscellaneous merchandise and to transport the household goods of Walgreen's employees in connection with the opening, closing, and remodeling of Walgreen drug stores within a 600 mile radius of Chicago.

On November 11, 1936, in the Bureau of Motor Carriers' Office, Petritz gave Nelson a statement to read and to sign, in connection with his pending application. Like the application itself, the statement gives the impression that Nelson's only contract was with Walgreen. Nelson questioned some of the items on this statement which gave that impression, but was told by Petritz that he should sign the statement in order to get the kind of permit he wanted because it was only necessary to show that he had *one* contract (in order to qualify as a contract carrier as opposed to a common carrier) and it was only necessary to show that he had made *one* delivery in each of the states for which authorization was requested. Petritz told him that, after he received his permit, he would be free to add other contracts so as to continue the kind of business he had been doing. Therefore, Nelson did what he was told and signed the statement.

---

[3] The fact of such registration, *per se*, constitutes evidence of *bona fide* operation to be considered in connection with the issuance of a grandfather permit under Section 209(a) of the Interstate Commerce Act, Part II, *supra*, p. 3.

The truth of the matter was that, as of the middle of 1935, Walgreen was Nelson's blue ribbon account, but not his only account, for he was hauling various commodities for other shippers and less than one-half of his business involved the transportation of merchandise to drug stores or drug warehouses. Nelson had delivery tickets to show this, but Petritz had asked for only Walgreen tickets when he investigated Nelson's operations.

As in the case of many uncontested grandfather applications, Nelson's was handled informally, without a hearing. On February 14, 1938, the Commission issued what is commonly known as a compliance order, reciting that Nelson had applied for a permit "according to the specification" set forth in the appendix to the order and that Nelson "was in bona fide operation in such manner on July 1, 1935" and subsequently. The order then directs that, upon Nelson's compliance with certain formalities, a permit should be issued authorizing him to engage in interstate commerce as a contract carrier by motor vehicle "according to the specification" set forth in the appendix to the order. (Appendix F, *infra*, p. 61.) The specification contained in the appendix, referred to in the order to show (1) what kind of a permit Nelson had applied for, (2) the Commission's finding as to the nature of his operations as of July 1, 1935, and (3) the scope of operations to be authorized in the permit to be issued, reads as follows (Appendix F, *infra*, p. 63):

> The business of applicant * * * in interstate or foreign commerce as a contract carrier by motor vehicle of the commodities indicated, over irregular routes, is as specified below:
>
> *New and used store fixtures, new and used household goods*, and *stock* in trade of drug stores,[4]
>
> Between points and places in [10 Midwestern States].

Finally, on March 13, 1942, the Commission issued Nelson's grandfather permit, authorizing him to engage in transportation service in interstate or foreign commerce as specified below (Appendix A, *infra*, p. 34-35):

> *New and used store fixtures, new and used household goods*, and *stock* in trade of drug stores, over irregular routes,
>
> Between points and places in [10 Midwestern states].

This, then, was the background of events that led up to the issuance of the grandfather permit whose interpretation was before the examiner in "Andrew G. Nelson, Inc. —Investigation of Operations".

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[4] This is the first time in the grandfather application proceedings that the phrase "*stock* in trade of drug stores" appears. Actually, as noted above, Nelson had applied for authority to haul "store fixtures, *miscellaneous merchandise*, and household furniture." (Italics supplied.) In addition, the delivery tickets and schedule of minimum rates submitted with Nelson's application described commodities hauled only by the following categories:

Miscellaneous fixtures.
Miscellaneous fountain outfit.
Miscellaneous store fixtures.
Miscellaneous merchandise.
Miscellaneous equipment.
Miscellaneous household goods.

On September 22, 1954, the examiner issued his report (1) setting forth the pertinent language of the permit, (2) listing the commodities transported by appellant which were alleged to be in excess of the authority granted by the permit, (3) pointing out that these items do constitute part of the stock in trade of a drug store, but (4) interpreting the "commodity description 'stock in trade of drug stores' " as meaning the same thing as "drug stores' stock in trade" and (5) concluding that, under that interpretation, appellant could transport commodities only to drug stores or could transport only commodities "which are earmarked for eventual delivery to and sale in a drug store." (Appendix A, *infra*, pp. 34-38.) Accordingly, the examiner found that appellant had engaged in operations not within the scope of its operating authority, in violation of Section 209(a) of the Interstate Commerce Act, Part II, and recommended the issuance of a so-called cease and desist order. (Appendix A, *infra*, p. 41.) It should be noted that, in reaching his decision, the examiner held that the permit contained no patent ambiguity, so that (Appendix A, *infra*, p. 36):

> In considering the issue thus presented neither the operations of respondent prior to the "grandfather" date, nor the Commission's intentions with respect thereto in issuing the permit, are of any importance.

Nevertheless, he did bolster his interpretation by "an examination of the circumstances under which the permit was issued," referring only to the documentary evidence concerning the grandfather application and ignoring, completely, Nelson's testimony explaining the circumstances under which the application had been made. (Appendix, *infra*, pp. 38-39.) It should also be noted that the examiner made no attempt to interpret the commodity descriptions "*New and used store fixtures*" or "*new and used house-*

hold furniture" to determine whether or not some of the commodities allegedly hauled in violation of the terms of appellant's permit might have been authorized by those descriptions;[5] rather, he stated that the "*sole issue* [required] a determination of the extent of the authority granted by the commodity description '*stock* in trade of drug stores'". (Appendix A, *infra*, p. 36.) (First italics supplied.)

Appellant filed exceptions to the examiner's report on October 29, 1954 and the Commission, by division 5, filed its report on March 17, 1955, overruling the exceptions and adopting the examiner's report as its own "except as modified herein."[6] (Appendix A, *infra*, pp. 27-34.) The Commission stated that, with respect to that portion of the permit primarily in issue, namely, the phrase "*stock* in trade of drug stores", it agreed with the examiner that

> * * * to the extent respondent is transporting commodities which at the time of their movement are not, or are not intended to become, part of the stock in trade of a drug store, such operations are in excess of its authority * * *

---

[5] At the beginning of the hearing, the Bureau's counsel had stated that some of the items might have been properly transported under the new and used store fixtures category.

[6] So far as we can see, the Commission's report modifies or supplements the examiner's in only three respects: (1) the term "*new and used store fixtures*" is defined, but by reference to two of the Commission's decisions and not with respect to the commodities whose transportation was in question in this case, (2) appellant's contention that some or all of the questioned commodities could be hauled as "new and used household goods" is rejected on the theory that any article which is part of the stock in trade of a mercantile establishment does not come within the meaning of "household goods," except as incident to the movement of such establishment from one location to another, and (3) the Commission, unlike the examiner, holds that the important question to be decided is what transportation was *intended* to be authorized by the language of the permit.

and directed the entry of an order "requiring respondent to cease and desist from the operations found to be unauthorized." (Appendix A, *infra*, pp. 33-34.) In reaching its conclusion the Commission held that the language of the permit was not ambiguous and, therefore, gave no consideration to events underlying its issuance. (Appendix A, *infra*, p. 30.)

On March 17, 1955, division 5 of the Commission issued an order requiring appellant, on or before May 2, 1955,[7] to cease and desist from the operations found in the Commission's report to be unauthorized and unlawful. (Appendix B, *infra*, p. 42.)

On December 12, 1955, appellant filed this action in the United States District Court for the Northern District of Illinois (Eastern Division) to set aside and to obtain an injunction against the operation of the Commission's cease and desist order. A hearing was held before a district court composed of Circuit Court of Appeals Judge Philip J. Finnegan and District Court Judges Walter J. LaBuy and Joseph Sam Perry, at which the entire record before the Commission (with certain minor exceptions) was introduced into evidence, certain documents concerning Nelson's grandfather application which were not a part of the Commission's record were introduced into evidence by agreement, and testimony and documents to support a showing of irreparable injury were introduced by appellant.

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[7] The effective date of the Commission's cease and desist order was voluntarily postponed, from time to time, by the Commission, so that it was finally fixed for August 1, 1956. On July 28, 1956, Justice Reed signed an order staying its operation pending this appeal.

THE QUESTIONS ARE SUBSTANTIAL.

I.

The Questions Regarding the Scope of the Commission's Power to Interpret Grandfather Permits and the Standards of Interpretation to Be Applied Are of Great Importance to a Large Segment of the Trucking Industry.

Appellant is one of a large number of motor carriers operating under the grandfather clause (Section 209 (a)) of the Interstate Commerce Act, Part II, *supra*, p. 3. *Descriptions in Motor Carrier Certificates*, 61 M.C.C. 209, 211 (1952). In this case, appellant is fighting to preserve the "substantial parity" between its predecessor's pre-governmental-regulation operations and subsequent operations which this Court has said to be guaranteed by the grandfather clause. *Alton R. Co.* v. *United States*, 315 U. S. 15, 22 (1942). This fight is made against the passage of time, the loss or destruction of records, the dimming of witness' memories, and, above all, changing policies of the Interstate Commerce Commission. Other carriers with grandfather rights have faced and will face the same challenges. The problems involved deserve this Court's attention.

Primarily involved in the first question presented is the Commission's interpretation of that portion of appellant's grandfather permit which authorizes the transportation of "*stock* in trade of drug stores". Appellant contends that this phrase, as used in its permit, was intended to be a commodity description—and nothing more, so that appellant is authorized to transport—without regard to the nature of consignor or consignee and without regard to the use to which the commodities may eventually be put—such merchandise as is ordinarily found for sale in drug stores.

On the other hand, the Commission ~~has ruled that implicit in the~~ phrase "*stock* in trade of drug stores" is the limitation that no commodities may be transported—even though they are of the kind which ordinarily constitute part of a drug store's stock in trade—unless, at the time of transportation, they are intended to become part of the stock in trade of a drug store. (Appendix A, *infra*, pp. 33-34.) In so ruling, the Commission, in 1954, applied the so-called intended use test to interpret the language of a grandfather permit issued in 1942 and based on a 1938 compliance order. The Commission refused to consider evidence of appellant's predecessor's (Nelson's) grandfather operations as an aid to construction. (Appendix A, *infra*, p. 30.)

In reply, appellant maintains that (1) the Commission's interpretation of the bare words of its permit, unaided by consideration of the grandfather operations, is erroneous; (2) the Commission's interpretation is erroneous because it fails to consider and give importance to the nature of Nelson's grandfather operations, or, (3) if the Commission properly interpreted the phrase without considering grandfather operations, the language of the permit fails to give appellant all of the operating rights to which it is entitled under the grandfather clause.

Those, then, are the contentions of the parties—much simplified for the purposes of this statement. Their opposing views grow out of the following circumstances:

The entire history of the Commission's administration of the statute regulating motor carriers shows its increasing efforts to restrict the scope of grandfather permits so as to place holders of such permits more on a par with the holders of new permits, whose terms and conditions, unlike those of grandfather permits, can be proscribed to suit the Commission's conception of its regulatory function.[8] For example, at first, the Commission ruled that it had no power to issue a permit restricting the class of shippers for whom a carrier might render service. *Longshore Carrier Application*, 2 M. C. C. 480 (1937). Later, when the Commission was searching for methods to narrow the scope of its authorizations, that ruling was reversed in *Keystone Transp. Co. Contract Carrier Application*, 19 M. C. C. 475 (1939).[9] For another example, the Commission's early position was that any restrictions on an operating authority must be expressed in the permit, and not implied. *Coastal Lines, Inc.* v. *Charlton Bros. Transp. Co., Inc.* 48 M. C. C. 284 (1948); *Atlantic Freight Lines, Inc.—Petition for Declaratory Order*, 51 M. C. C. 175, 188-189 (1949). For an example of the application of this approach in the interpretation of a commodity description see *Sanders Extension of Operations—Washington, D. C.*, 47 M. C. C. 210 (1947). Later, however, the Commission developed the intended use theory (applied in interpreting Appellant's permit) as a device for limiting the scope of commodity descriptions.[10] Under this theory, what might on its face appear to be a generic description of authorized commodities by reference to places where they are found or sold or by reference to classes of persons who use them, becomes a restriction, by reference to ultimate destination or use, on the commodities, within such generic description, that may be hauled. The Commission itself has indicated that the intended use test is unsatisfactory and that it is often difficult to tell whether a particular phrase in a permit is to be taken in the former or the latter sense.[11] Indeed, the Commission, itself, has not attempted to apply the intended use test across the board. See *Vidas Contract Carrier Application*, 62 M. C. C. 106 (1953) and *Carroll Trucking Co., Interpretation of Certificate*, 62 M. C. C. 348 (1953).

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[8] See concurring opinion of Chairman Eastman in *Keystone Transp. Co. Contract Carrier Application*, 19 M. C. C. 475, 498-499 (1939), in which he warns that great care should be taken, in issuing grandfather permits, to accurately and closely specify and define the scope of the operating authority because there is less opportunity for control in grandfather cases.

[9] The Commission's right to issue a permit restricting the class of shippers to be served (so long as the grandfather operations were so restricted) was upheld by this Court in *Noble* v. *United States*, 319 U. S. 88 (1943), but it is well established that no such restriction can be implied in a permit in which it is not explicit. *Vidas Contract Carrier Application*, 62 M. C. C. 106, 107 (1953). It should be noted that appellant believes that the Commission's application of the intended use test to the interpretation of its permit in this case is nothing more than an attempt to circumvent this prohibition and effectively impose the equivalent of a so-called Keystone restriction on its operations.

On the whole, the federal courts have been a bulwark against the Commission's efforts to contract the scope of grandfather permits. In *United States* v. *Carolina Carriers Corp.*, 315 U. S. 475 (1942), this Court refused to allow the Commission to issue a grandfather common carrier's certificate which would have (1) denied authority to transport certain commodities that had been carried before, but not since, the grandfather date (June 1, 1935), even though of the same class as commodities which had been carried on that date and thereafter and (2) authorized the transportation only of those commodities which, both before and after the crucial date, had been carried in substantial amounts, with regularity.[12] And in *United States* v. *Seatrain Lines*, 329 U. S. 424 (1947), this Court established the cardinal principle on which appellant relies, viz., that the Commission has no more power to limit the scope of operating authority in a grandfather certificate (or permit, as in this case), once it has been granted, than it had to so limit the operating authority in granting the certificate in the first place—particularly when the Commission's purpose is to give effect to new policies formulated after the certificate was granted.[13]

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[10] We believe that the earliest application of the intended use test, though not so labelled at the time, was in *England Transp. Co., Inc., Extension—Mississippi Points*, 49 M. C. C. 567 (1949). With the precedent established, many other decisions applying the test soon followed. See, for example, *Builders Exp., Inc., Interpretation of Certificate*, 51 M. C. C. 103 (1949); *Greenberg—Investigation of Operation*, 52 M. C. C. 25 (1950); *Fleetlines, Inc.* v. *Osbourne Trucking Co.*, 52 M. C. C. 221 (1952); *Mural Trucking Service, Interpretation of Certificate*, 63 M. C. C. 47 (1954).

[11] *Pierce Auto Freight Lines, Inc.* v. *Converse*, 54 M. C. C. 447, 453 (1953), affirmed (with the reservation that the court was not prepared to say that it would approve the intended use test under all circumstances), 109 F. Supp. 807 (N. D. Calif., 1953); *C & H Transp. Co., Inc., Interpretation of Certificate*, 62 M. C. C. 586, 587 (1954).

In *Interstate Commerce Commission* v. *Ratner*, decided April 15, 1947 (N. D. Ill.),[14] the Court refused to grant the Commission's request for an injunction against the transportation of beer and empty beer containers from a brewery to a distributor where the commodities authorized in the permit were "*Such merchandise* as is dealt in by wholesale food business houses, and * * * *equipment, materials* and *supplies* used in the conduct of such business," inasmuch as the Court found that wholesale food business houses did deal in and distribute beer. In *Salvino* v. *United States*, 119 F. Supp. 277 (W. D. Wash., 1954), the Court set aside a Commission order which denied the carrier authority to transport materials used by his consignees as components of their manufactured products on the theory that the carrier's commodity description ("factory supplies") authorized the transportation only of supplies used in manufacturing the product. The Commission had, as in this case, refused to consider evidence of the carrier's grandfather operations. The Court held that the Commission (1) should have examined the grandfather operations and (2) was not entitled to interpret the commodity description in the light of a refinement in definition worked out after the permit had been issued[15] and remanded the case to the Commission.[16] Finally, in *Bird Trucking Co.* v. *United States*, decided September 26, 1955 (W. D. Wis.),[17] the Court set aside the Commission's interpretation of the commodity description "groceries", which had been arrived at (1) without due consideration of the evidence concerning the carrier's grandfather operations and (2) by reference to a refined definition of the term worked out by the Commission after the grandfather permit had been issued.

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[12] This holding was in accord with the legislative history underlying the grandfather clause, which makes it clear that the important criterion was the nature of the carrier's business on the crucial date and not the particular operations, under individual contracts, in which he was engaged on that date. 79 Cong. Record, Part 5, p. 5654. See also *Alton R. Co.* v. *United States*, 315 U. S. 15 (1942).

[13] Applied to the situation in this case, if the Commission's cease and desist order restricts Appellant's operating authority (1) more than the language of the permit, properly interpreted, warrants or (2) more than the grandfather operations, which should have been accurately reflected in the permit's language, warrant, it is unlawful.

[14] Not officially reported, but reprinted in 6 Federal Carriers Cases, par. 80,415.

We submit that the decisions in the *Salvino* and *Bird* cases are in conflict with the decision of the district court in this case[18] with respect to the scope of the Commission's power to interpret the language of grandfather permits by standards adopted after they were issued and without due consideration of the underlying grandfather operations. The questions thus raised have never received plenary consideration by this Court,[19] but are of obvious public import and should be resolved. It is particularly important that these questions be resolved as soon as possible because carriers whose permits are subjected to scrutiny under the intended use test have virtually no alternative but to present evidence of their grandfather operations[20]—evidence which obviously becomes more difficult to acquire as time passes, memories are dimmed, and records are no longer available.

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[15] Gradually, the Commission had broken down its commodity descriptions into (1) factory *materials* and (2) factory *supplies*.

[16] On remand, the Commission decided that Salvino had carried both materials and supplies in the grandfather days and that "factory supplies" did not, when his permit was issued, have the subtle meaning since ascribed to it. Issuance of a new permit to cover both commodities was authorized. *Johnson Truck Service* v. *Salvino*, 63 M. C. C. 1 (1954). The Commission adopted the same approach, viz.: issuing a new permit to correct the inadequacy of a grandfather permit created solely by a refinement of definition subsequently adopted, in *Grifall Common Carrier Application*, 62 M. C. C. 763 (1954).

[17] Not officially reported, but reprinted in 11 Federal Carriers Cases, par. 81,028.

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[18] In this field, of course, decisions by district courts of three judges are equivalent to decisions by the Courts of Appeal, since they may be reviewed only by this Court.

[19] Several cases in which carriers attempted to construe the language of their permits or certificates to authorize operations larger in scope than their grandfather operations have been presented to the Court, but the questions raised by this appeal have never been resolved. See *Dart Transit Co.* v. *Interstate Commerce Commission*, 110 F. Supp. 876 (Minn., 1953), motion to affirm granted, *per curiam*, 345 U. S. 980 (1953); *Callahan Road Imp. Co.* v. *United States*, 107 F. Supp. 184 (N. D. N. Y., 1952), affirmed, 345 U. S. 507 (1953), rehearing denied, 345 U. S. 978 (1953); *Pomprowitz* v. *United States*, 119 F. Supp. 824 (E. D. Wis., 1954), motion to affirm granted, *per curiam*, 348 U. S. 803 (1954), rehearing denied, 348 U. S. 889 (1954). Without going into the merits of the case at this time, we believe the statement, *supra*, pp. 7-10, shows that Nelson's grandfather operations were at least broad enough to authorize the transportation of the commodities in issue in this case. In addition, there is a substantial question as to whether or not the language of the permit accurately reflects what the Commission itself found, in its compliance order, to be the scope of the grandfather operations. (See pp. 9-10, *supra*.)

[20] The Commission has ruled that the carrier has the burden of proving the nature and scope of his grandfather operations. *Dart Transit Co., Modification of Permit*, 49 M. C. C. 607, 609 (1949). Compare Section 7 (c) of the Administrative Procedure Act (49 U. S. C. 1952 ed. Sec. 1006 (c)), which provides that, except as otherwise provided by statute, the proponent of an order shall have the burden of proof.

II AND III.

It Is Equally Important That, in Arriving at Its Decisions, the Commission Should Respect the Requirements of the Administrative Procedure Act.

The Commission's report and order are as defective procedurally as they are substantively.

First, if, as we believe, appellant's grandfather operations are important in considering whether or not it has hauled commodities not authorized in its permit, the Commission's report fails to make findings and conclusions with respect to those operations, with reasons and bases therefor, as required by Section 8 (b) of the Administrative Procedure Act (*supra*, pp. 3-4) and by this Court (see *Howard Hall Co.* v. *United States*, 315 U. S. 495 (1942)). Although the examiner's report, adopted by the Commission, does mention the grandfather operations, as a makeweight, it does not at all consider (even if only to reject) the effect of Nelson's testimony on the probative value of the documentary evidence before him.[21] (Appendix A, *infra*, pp. 38-39.) Even if it should be assumed that the Commisison did consider (and accept as conclusive) the documentary evidence concerning the grandfather application, unexplained by Nelson's testimony, appellant claims that this action is unsupported by substantial evidence, as required by Section 10 (e) of the Administrative Procedure Act (*supra*, p. 4). Since *Universal Camera Corp.* v. *Labor*

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[21] There is some doubt as to whether or not the Commission intended to adopt this portion of the examiner's report, since his report was adopted only insofar as not modified in the Commission's report and the latter rejects all consideration of grandfather evidence. (Appendix A, *infra*, pp. 30, 33.)

Board, 340 U. S. 474 (1951), it has not been doubted that this section authorizes courts reviewing administrative decisions to consider evidence in the record contradictory to that relied on by the agencies, in determining the reasonableness and fairness of those decisions.

Second, the Commission failed to make findings and conclusions with respect to whether or not any or all of the commodities alleged to have been transported without authority might have been rightfully transported under those portions of appellant's permit which authorize the transportation of "*new and used store fixtures*" or "*new and used household goods.*" Even the Bureau's counsel thought that some of the items hauled might come within the former commodity description; and yet the examiner ignores the problem completely and the Commission merely refers to the fact that these commodity descriptions have been defined in other Commission decisions without determining whether or not any of the commodities in question fall within those categories, as so defined.[22] (Appendix A, *infra*, pp. 30-31.) For example, one of the categories of items whose transportation was challenged in the Commission's January 21, 1954, order initiating the investigation was kitchen, storage, or wardrobe cabinets or lockers,[23] which would appear to be either store fixtures or household goods, but there was no evidence to show the consignee's business or the circumstances under which they were hauled. Therefore, even if the Commission had seen fit to make findings and conclusions with respect to the propriety of transporting these items, it would have had no support in the record and it is elementary that the proponent of the cease and desist order has the burden of proof. Administrative Procedure Act, Sec. 7 (c).

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[22] Of course, the fact that these commodity descriptions have been defined by the Commission in other situations does not necessarily mean that the same definitions apply to appellant's permit, which was issued *before* those refined definitions were developed by the Commission in the decisions cited. The only important question is what was intended by the use of the commodity descriptions "*New and used store fixtures*" and "*new and used household goods*" in this appellant's permit. See *Petroleum Carrier Corp.* v. *Black*, 51 M. C. C. 717 (1950); *Bison Freight Lines* v. *Northwest Dispatch, Inc.*, 60 M. C. C. 506 (1954); and *Salvino* v. *United States*, 119 F. Supp. 277 (W. D. Wash., 1954). The definition of household goods referred to is narrower in scope than the Commission's published definition, in force when appellant's permit was issued and is, therefore, wholly inappropriate. See *Practices of Motor Carriers of Household Goods*, 17 M. C. C. 467 (1939).

Third, and in some ways, most important, the cease and desist order is arbitrary, capricious, and void for vagueness and indefiniteness. At issue was appellant's right to transport certain specified commodities. Decision of that issue necessarily involved a determination of the scope of appellant's operating authority. The examiner determined that scope, though only so far as the phrase "*stock* in trade of drug stores" was concerned, by applying the intended use test and concluded that appellant should be ordered to cease operations not authorized by its permit. To this, the Commission's report adds no more than a vague reference to the Commission's current definitions of new and used store fixtures and new and used household furniture. Finally, the cease and desist order itself merely orders appellant to abstain from the operations found in its report (which incorporated the examiner's report) to be unauthorized and unlawful. (Appendix B, *infra*, p. 42.) An order of this sort is like a general decree to stop violating the law. It could be interpreted as ordering appellant to cease transporting those commodities specifically at issue; it could be interpreted as ordering appellant to respect the intended use test with respect to all commodities coming within the "*stock* in trade of drug stores" category; or, perhaps it was meant to order some sort of compliance with respect to the hauling of store fixtures and household goods, though it is surely impossible to obtain any guide to appellant's conduct under these commodity descriptions from the report and order. At least in *Dart Transit Co., Investigation of Operations*, 54 M. C. C. 429 (1952), affirmed 110 F. Supp. 876 (Minn., 1953), motion to affirm granted, *per curiam*, 345 U. S. 980 (1953), the cease and desist order described the commodities not to be hauled and gave some indication of the scope of the order.

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[23] Neither the examiner's nor the Commission's report refers to these items.

If appellant is to be subjected to the possibility of having its permit revoked under Sec. 212 (a) or of having criminal sanctions imposed under Sec. 222 (a) of the Interstate Commerce Act, Part II (49 U. S. C. 1952 ed., Secs. 312 and 322) for non-compliance with this order, it should at least be reasonably apprised by the order of what it can and cannot haul.

Conclusion.

There is little doubt that the Commission's application of the intended use test to the interpretation of "*stock* in trade of drug stores" in appellant's permit, if allowed to stand, will put it out of business.[24] Therefore, a determination of the issues involved is obviously important to appellant. But it is also important that other holders of grandfather permits and, indeed, the Commission (in its administration of the Interstate Commerce Act) should know the scope of the Commission's power to interpret grandfather permits, the proper canons of interpretation to be applied, and the procedural requirements for effectuating its interpretations.

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[24] Appellant's president testified before the district court that its gross income from October 1, 1954 to December 31, 1955, was $952,881, 95% of which was derived from transporting commodities commonly held for sale by drug stores, but which, at the time of transportation, were not known to be destined for ultimate sale in a drug store. How, for example, could appellant be expected to require shippers of candy to earmark each box for sale in a drug store, rather than in a candy store or department store or by a sidewalk vendor, and still retain their business?

For these reasons, the questions raised in this appeal are substantial and deserve plenary consideration by this Court, with an opportunity for briefs and a hearing on the merits.

Respectfully submitted,

Paul E. Blanchard,
Victor E. Lewis,
Edward W. Rothe,
Counsel for Appellant.

August, 1956.

APPENDIX A.

INTERSTATE COMMERCE COMMISSION.

No. MC-C-1610.

ANDREW G. NELSON, INC.—INVESTIGATION OF OPERATIONS.

Submitted December 13, 1954. *Decided March 17, 1955.*

Respondent found to be engaged in transportation not authorized by its permit and not to be in compliance with the requirements of section 209(a) of the Interstate Commerce Act. Cease and desist order entered.

Paul E. Blanchard and *Milton E. Diehl* for respondent.

James A. Murray, Hugh E. Lillie, James Y. Piper, and *Thomas J. Delaney* for Bureau of Inquiry and Compliance, Interstate Commerce Commission.

Eugene L. Cohn, Bernard G. Colby, Ovid Crouch, Claude G. Metzler, Joseph M. Scanlon, Carl L. Steiner, and *Glenn W. Stephens* for interveners in support of the investigation.

REPORT OF THE COMMISSION.

DIVISION 5, COMMISSIONERS CROSS, TUGGLE, AND HUTCHINSON.
BY DIVISION 5:

Exceptions were filed by respondent to the order recommended by the examiner, and certain interveners and the Bureau of Inquiry and Compliance, Interstate Commerce Commission, hereinafter referred to as the Bureau, replied.

Respondent's exceptions are nine in number. It excepts: (1) to the alleged fragmentary and incomplete statements of fact in the report of the examiner, specifically as regards those historical facts relating to the original "grandfather" application and the so-called "compliance order" which constituted a step in the informal processing of the application of respondent's predecessor-in-interest culminating in the issuance of the assailed permit; this exception is premised on a conclusion that the terms of the permit are ambiguous; (2) to the examiner's statement of the issue to be "a determination of the extent of the authority granted by the commodity description '*stock* in trade of drug stores' ", it being respondent's position that the sole issue relates to whether the permit contains a so-called "Keystone" restriction, limiting the persons whom respondent may serve to a certain class of shippers; (3) to the alleged inconsistency between the examiner's finding that "*stock* in trade of drug stores relates to stock kept for sale purposes by one who operates a drug store, and the position of the Bureau that the intended use test is applicable here, it being respondent's contention that if the examiner's interpretation is correct the permit would allow only the movement from one shelf to another in the same store rather than a movement which is unrestricted so long as it is earmarked for eventual delivery to, and sale in a drug store as the Bureau urges; (4) to the examiner's refusal to accept respondent's interpretation of the term "*stock* in trade of drug stores" as meaning "commodities described as stock in trade of drug stores", it being respondent's contention that such refusal is equally critical of the previously noted compliance order, entered herein; respondent argues that the compliance order must be examined to determine whether or not the permit effectuates that order; (5) to the examiner's selection of the particular dictionary definitions of the word "of", in his interpretation of the term "stock in trade *of* drug stores," claiming that his choice is designed to suit the objective of the Bureau; it argues that there are many other definitions of the word "of" which make equally as much sense as the one adopted by the examiner connoting possession and ownership; (5) to the examiner's alleged failure to point out that this permit was issued subsequent to the determination by this Commission that a permit may be restricted to a certain class of shippers, in the face of which the permit in question was not so limited, it being argued that the "Keystone" restriction could have been inserted in the permit but was not, and cannot now be read into the authority; it urges further that the Commission abandoned the intended use test in the report in *Vidas Contract Carrier Application*, 62 M. C. C. 106, which decision, it alleges, is controlling here; (7) to the alleged failure of the examiner to point out that respondent's permit embraces authority to transport "new and used household goods", the scope of which has already been spelled out and defined by the Commission, and that under such definition respondent has authority to transport almost every article, from every consignor to every consignee, named in the investigation order, regardless of the scope of consignee or consignor coverage included in the term "*stock* in trade of drug stores." It is respondent's position that the Commission's definition of "household goods" in *Practices of Motor Common Carriers of Household Goods*, 17 M. C. C. 467 authorizes it to transport "*property of stores* * * * when *part of the stock, equipment or supply* of such stores * * *", without restriction of any kind; (8) to the inclusion in the report of the discussion of our power to revoke a permit and the procedure by which such action is to be accomplished, it being contended that such discussion has no relevancy here; and

(9) to the examiner's reference to the number of opposing motor carriers and associations thereof, and rail carriers, charging this was an attempt unduly to inflate the degree of opposition to respondent; it claims that much of the opposition was "nominal" and that relatively few motor carriers were serious in their support of the Bureau.

In reply certain interveners support the findings and conclusions of the examiner except that they would place an even more limited interpretation on the term "stock in trade." They urge now, as they did at the hearing, that under trade usage and practice, such term does not include all commodities that a drug store may have for sale purposes. In particular they would exclude such commodities as storage batteries, cabinets, lockers, canned vegetables, pickles and similar articles, which they assert are known in the trade as "drug sundries" rather than "stock in trade". The Bureau and certain other interveners support the findings and conclusions of the examiner and urge that they be sustained.

We agree with the contention of the parties and the examiner's conclusion that there is no such patent ambiguity in the permit as to warrant going back of it and giving consideration to events prior to its issuance. This obviates the necessity for consideration of respondent's first and fourth exceptions which are premised on such events.

As to the second and seventh exceptions, we are of the opinion that the examiner's statement and discussion of the issue is sound as regards the phrase "*stock* in trade of drug stores". Involved also, however, is a determination of the extent of authority granted by the terms "*new and used store fixtures*" and "new and used household goods". It appears that examiner's omission of a statement regarding these terms stems from the fact that at the hearing respondent did not appear seriously to contend that such terms authorized it to conduct the operations to which the investigation order made reference. Even on exceptions no question is raised as to the meaning of the term "*new and used store fixtures*", which is adequately defined in *Shelinsky Common Carrier Applicaton*, 52 M. C. C. 349, at 359, where division 5 said:

> "In our opinion, a motor carrier authorized to transport 'store fixtures' is limited to such items as showcases, counters, tables, floor cabinets, wall cases and other items of similar utility."

and in *Mural Trucking Service Interpretation of Certificate*, ... M. C. C., ..., decided November 15, 1954, where, in interpreting the term "store fixtures and store equipment", division 5 stated:

> "Petitioners' operations, although not actually limited to the transportation of shipments moving to stores * * *, are, nevertheless, strictly limited to the transportation of commodities which at the time of the transportation are intended for such use."

Respondent's contention with respect to the meaning of "household goods" is totally without merit. Any article which is a part of the stock in trade of a mercantile establishment does not for that reason come within the meaning of "household goods", except as an incident of the movement of such establishment from one location to another. See *Barnett Extension of Operations—Furniture*, 44 M. C. C. 587, *Shapiro Extension—Shuffleboards*, 49 M. C. C. 634, and *North American Van Lines, Inc., Extension—New Furniture*, 49 M. C. C. 368.

As to the third exception, we do not agree that an inconsistency exists between the intended use test and the examiner's statement that "*stock* in trade of drug stores" means stock kept for sale purposes by one who operates a drug store. The definition is valid and points, in our opinion, to the obvious equivalent of the description in the permit, which is "drug stores' *stock* in trade", as the examiner concluded. The important determination here, as in all such inquiries, is what transportation was intended to be authorized by this language of the permit. In *C & H Transp. Co. Inc., Interpretation of Certificate*, 62 M. C. C. 586, division 5 concluded that authority to transport "contractors' equipment and supplies" authorizes the transportation of all forms of equipment and supplies which are at the time of movement intended for use by a contractor, and further that when the controlling use is established, the commodity may be transported for or to anyone, and the identity of the shipper or consignee is not important except as it may tend to establish or confirm the intended use. The similarity between the phrase there interpreted and "*stock* in trade of drug stores" or its equivalent, "drug stores' *stock* in trade", is readily apparent, and no good reason has been advanced for a conclusion here, different from that in the case just cited.

The fifth exception raises no question not disposed of in our discussion of the third and need not be further considered.

The sixth, eighth, and ninth exceptions are without merit. As to the sixth, no attempt has been made to read into respondent's permit a "Keystone" restriction. The commodity limitation in its permit does not limit the class or type of persons with whom it may contract as would a "Keystone" restriction. Further, respondent's argument that the intended use test has been abandoned by the Commission is fallacious. True it was found inapplicable in the *Vidas* case, *supra*, but it remains valid and has been found applicable in proceedings more recent than *Vidas*. See *C & H Transp. Co. Inc.*, *supra*, and *Mural*

Trucking Service Interpretation of Certificates, supra. As to the eighth, respondent, itself, in its brief raised certain questions as to the procedure by which a permit might be revoked, and in his report the examiner clarified the matter. Moreover, the order instituting this investigation specified that this action was taken under sections 204(c) and 212(a) of the Interstate Commerce Act, the latter section dealing, among other things, with our power to revoke or suspend operating authorities. As to the ninth, suffice it to point out that the examiner correctly indicated the support of interveners which the Bureau has in this proceeding, and that of the "nominal" opposition to which respondent refers, briefs and replies to respondent's exceptions herein were filed on behalf of 17 motor carriers and an association of motor carriers.

We are unable to agree with the contention of certain interveners that "stock in trade" has a more limited meaning than that advanced by the examiner, although we do agree that cognizance of trade usages may be taken in determining proper construction of terms used in authorities. In any event, it is of no moment in the instant proceeding as the conclusion does not depend on such determination.

We have given full consideration to respondent's exceptions and the replies thereto and find that except as modified herein the examiner has adequately stated the facts and conclusions on the issues in the report hereinafter set forth which accompanied his recommended order. With respect to that portion of the permit primarily in issue, namely, the phrase reading "*stock* in trade of drug stores", we agree with the conclusion of the examiner that to the extent respondent is transporting commodities which at the time of their movement are not, or are not intended to become, part of the stock in trade of a drug store, such operations are in excess of its authority and are in violation of section 209 of the act and should be discontinued. In the circumstances we adopt his report and findings as our own. An appropriate order requiring respondent to cease and desist from the operations found to be unauthorized will be entered.

REPORT OF THE EXAMINER.

By order entered January 21, 1954, the Commission, division 5, instituted this investigation with a view to determining whether Andrew G. Nelson, Inc., hereinafter called respondent, is and has been engaged in the transportation of commodities not within the scope of its operating authority, in violation of section 209(a) of the Interstate Commerce Act, or of any requirement, restriction, term, or condition of its permit. The order further provided for the issuance of such orders and the taking of such other action as the facts and circumstances may appear to warrant, and that upon the failure of respondent to comply with any order issued herein, to conduct a further proceeding to determine whether the respondent's permit should be suspended or revoked.

The matter was referred to the examiner for hearing and the recommendation of an appropriate order thereon. Hearing was held in May 1954, at Chicago, Ill. The Bureau of Inquiry and Compliance, of the Commission, hereinafter called the bureau, was joined in its support of the investigation by 19 motor carriers, 3 associations of motor carriers, and the class I rail carriers in western territory.

The respondent operates under the authority of permit No. MC-1194, which was issued on March 13, 1942 pursuant to a "grandfather" application filed on January 2, 1936. The permit was issued in the name of Andrew G. Nelson, doing business as Nelson Warehouse & Express Co., Chicago, Ill., and provided for transportation service in interstate or foreign commerce as specified below:

> *New and used store fixtures, new and used household goods,* and *stock* in trade of drug stores, over irregular routes.
>
> Between points and places in Illinois, Indiana, Iowa, Kentucky, Michigan, Minnesota, Missouri, Nebraska, Ohio, and Wisconsin.

Subsequently, by order dated March 12, 1951, the Commission in No. MC-FC 53070 authorized transfer of the aforesaid operating rights to Andrew G. Nelson, Inc., and the permit was transferred by order dated June 18, 1951. The sole stockholder was Andrew G. Nelson, the original applicant, and on April 1, 1953, he sold his stock to the present operators.

The bureau introduced evidence showing that in 1953 during the period July 31 to December 16, the respondent transported in interstate commerce the following commodities from consignors, *none of whom were drug stores,* to the consignees whose business is as indicated: Numerous and varied canned or packaged grocery items to grocery stores or warehouses; dry and liquid cream and fruit juices to food manufacturers; beer and wines to liquor distributors; 100-pound bags of dry glue to a company whose business is not stated of record; candy to a wholesale candy distributor; dry milk to a distributor of that product; malted milk powder and milk food to a manufacturer of drugs and dietetic foods; and automobile batteries to a general merchandising company. It was also shown by the bureau that in the period from April 24, 1951 to April 1, 1953, the respondent entered into 14 contracts with shippers, and that 32 contracts were signed by the new stockholders in the first 8 months of their management.

Although some of the commodities transported by respondent might be questioned as to whether they constitute part of the stock in trade of a drug store, the bureau does not raise such question. Instead, it contends that the authority to transport "*stock* in trade of drug stores" permits only the transportation of commodities which at the time are part of the stock in trade of a drug store, or are intended for eventual use as the stock in trade of a drug store. Thus, the bureau's ultimate contention is that the respondent's permit restricts transportation to authorized commodities moving to or from a drug store, or to or from a warehouse or other repository when such commodities are earmarked for eventual use as the stock in trade of a drug store.

The respondent contends that the description "*stock* in trade of drug stores" permits transportation from and to any consignor and consignee, provided of course that the commodities transported are the same as those sold in drug stores. It is asserted by respondent that the permit does not include any language restricting the transportation to a particular or specified class of consignees.

The sole issue herein is thus explicit and requires a determination of the extent of the authority granted by the commodity description "*stock* in trade of drug stores." None of the parties claim that such description is patently ambiguous, and ambiguity may not be assumed merely from the fact that the bureau and interveners are in disagreement with respondent as to the meaning of the description. In considering the issue thus presented neither the operations of respondent prior to the "grandfather" date, nor the Commission's intentions with respect thereto in issuing the permit, are of any importance.

The principal contention on behalf of the respondent with respect to the term "*stock* in trade of drug stores" is that such description unequivocally grants authority to transport "commodities described as stock in trade of drug stores". It is then argued that the latter description is obviously unrestricted as to the class of consignees who may be served by respondent. This argument is completely without merit because it is based on the false premise that the respondent's permit authorizes the transportation of "commodities described as stock in trade of drug stores". As stated before, the issue presented herein is explicit, namely, a necessary interpretation of the commodity description "*stock* in trade of drug stores". Any arguments as to the authority granted by the description "commodities described as stock in trade of drug stores", clearly change the basic issue and are irrelevant.

An interpretation of the commodity description "*stock* in trade of drug stores", immediately and obviously presents the initial question as to the purpose of the Commission in emphasizing the word stock by underscoring. It will be noted that the other commodity descriptions in the permit, namely, "*New and used store fixtures, new and used household goods*" are completely underscored. Therefore, the underscoring of only the word "stock" in the description "*stock* in trade of drug stores" was intentional in order to segregate and emphasize such word within the disputed description. The only possible meaning that can be attached to such segregation and emphasis is that the transportation of "stock", as further defined in the commodity description, is authorized by the permit granted to respondent. The word "stock" in a mercantile sense simply means goods possessed by a merchant or manufacturer. Such goods include articles either for sale or for the possessor's own use. The following words in the description are "in trade" and they modify the word "*stock*" by restricting it to mean only those goods which are kept by a merchant or manufacturer for sale purposes. The subsequent words in the description are "of drug stores" and they further modify and explain the preceding words "*stock* in trade" by limiting them to a particular class of merchant, namely, one who operates a drug store.

The correctness of the above interpretation is apparent if attention is directed specifically to the word "of" in the disputed commodity description. Among the numerous definitions applicable to "of", only that connoting possession or ownership has any sensible meaning as used in respondent's permit. In other words, the commodity description under consideration is merely a different but equally effective manner of stating "drug stores' *stock* in trade". The limitation as thus imposed by the commodity description is not restricted to deliveries to drug stores but, as stated by the bureau, also includes goods which are earmarked for eventual delivery to and sale in a drug store. Accordingly, respondent's past and continued transportation in excess of that granted by its permit, as described herein, is in violation of section 209(a) of the act and should be discontinued immediately.

Although there is no such patent ambiguity in the permit as to warrant consideration of events prior to its issuance to Andrew G. Nelson, the correctness of the interpretation set forth hereinbefore is borne out by an examination of the circumstances under which the permit was issued. A hearing was not held in connection with the "grandfather" application but instead the Commission relied on a signed statement from Nelson, accompanied by delivery receipts showing interstate contract movements for Walgreen Company in the period June 27, 1934-September 21, 1935. The Walgreen Company operates a chain of drug stores throughout the territory respondent is authorized to serve. The statement signed by Nelson contained the following unqualified assertions:

"That he is an interstate contract carrier of property

> for the Walgreen Company and for it alone. That he hauls to and from Walgreen Retail Stores located within 600 miles of Chicago. That said transportation has to do with the opening, the remodeling, and/or the closing of Walgreen retail stores, the commodities so transported are usually store fixtures and equipment and merchandise for the opening stock."

These declarations by Nelson in a signed statement show that he desired only to continue serving retail drug stores of one company. However, the terms of the permit go beyond Nelson's request to the extent that there is no restriction other than territorial in the permit with respect to the transportation of new and used store fixtures and household goods, and the transportation of the stock in trade of drug stores is not limited to only one chain of drug stores as consignees or ultimate users. With the exceptions noted, the permit complies with the transportation that Nelson claimed he was engaged in on the "grandfather" date, and which he wished to continue.

The Commission's power to revoke a permit is circumscribed by express provisions in section 212(a), and is adequately discussed in *Florence Lane-Revocation of Permit*, 52 M. C. C. 427. In that proceeding, the Commission, division 5, said: "* * * a revocation of permit may be effected only after a notice and hearing and then only for wilful failure to comply with an order issued after a notice and hearing under section 204(c)." Thus two "notices and hearings' are required. Notice and hearing which is the very essence of due process means an opportunity to be heard. In *Dohany* v. *Rogers*, 281 U. S. 362, 369, it is said that the requirements of due process are satisfied so far as procedure is concerned if the person "has reasonable notice and reasonable opportunity to be heard and to present his claim or defense, due regard being had to the nature of the proceeding and the character of the rights which may be affected by it." Section 5 of the Administrative Procedure Act provides, in part:

> (a) NOTICE.—* * * In instances in which private persons are the moving parties, other parties to the proceeding shall give prompt notice of issues controverted in fact or law; and in other instances agencies may by rule require responsive pleading. * * *
>
> (b) PROCEDURE.—The agency shall afford all interested parties *opportunity for (1) the submission and consideration of facts.* * * * (Emphasis supplied.)

Rule 43 of the General Rules of Practice Before the Commission, reads as follows:

> An order instituting an investigation will be served by the Commission upon respondents. If, within a time period stated in that order, *a respondent fails to comply with any requirement specified therein, respondent shall be deemed in default and to have waived any further hearing.* Thereafter the investigation may be decided without further proceedings. (Emphasis supplied.)

It is apparent that the statutory requirements of notice and hearing are satisfied if the parties are given a reasonable notice and afforded a reasonable opportunity to be heard, and that in proceedings initiated by an investigation such as here, the Commission may require a responsive pleading respecting the desire of a respondent to an oral hearing, and, in the event respondent fails to comply with this requirement, respondent shall be deemed in default and to have waived its right to such oral hearing. The evidence indicates that respondent will appear at a second hearing in the event of default of the order under section 204(c) entered herein. Nevertheless, in the circumstances here present it is appropriate to call upon respondent to inform the Commission, in writing, if it desires an oral hearing (above mentioned second hearing).

The examiner finds that respondent has been and is engaged in the conduct of operations not within the scope of its operating authority, in violation of section 209(a) of the act, and that an order should be entered requiring respondent, within 60 days of the effective date of the order, to discontinue such unlawful operations and thereafter maintain only the operations authorized by its permit and to comply with the provisions of section 209(a) of the act, and within 10 days thereafter inform the Commission in a written statement under oath whether or not compliance has been made therewith.

The examiner further finds that in the event respondent fails, within 60 days of the effective date of the order, to operate only as authorized by its permit and to comply with section 209(a) of the act, it should be required to inform the Commission, in writing, within the time above specified for informing the Commission regarding compliance or noncompliance, if an oral hearing is desired at which to present further evidence as to why the permit should not be revoked, failing in which respondent shall be deemed in default and to have waived such oral hearing and the matter shall be taken under consideration on the facts then of record with a view to the entry of an order revoking its permit if it should be determined that such action is warranted.

APPENDIX B.

ORDER.

At a Session of the Interstate Commerce Commission, Division 5, held at its office in Washington, D. C., on the 17th day of March, A. D. 1955.

No. MC-C-1610.

Andrew G. Nelson, Inc.,—Investigation of Operations.

Investigation of the matters and things involved in this proceeding having been made, and the said division, on the date hereof, having made and filed its report herein containing its findings of fact and conclusions thereon, which report is hereby referred to and make a part hereof, and said proceeding having been duly submitted:

It is ordered, That respondent Andrew G. Nelson, Inc., be, and it is hereby, notified and required to cease and desist on or before May 2, 1955, and thereafter to abstain and refrain, unless and until appropriate authority therefor is obtained, from the operations in interstate or foreign commerce found in said report to be unauthorized and unlawful.

By the Commission, division 5.

Harold D. McCoy,
Secretary.

(seal)

APPENDIX C.

United States District Court
For the Northern District of Illinois,
Eastern Division.

Andrew G. Nelson, Inc.,
Plaintiff,
vs.
United States of America and Interstate Commerce Commission,
Defendants,
and
Advance Transportation Co., Inc., et al.,
Intervening Defendants.

Civil Action No. 55-C-2302.

MEMORANDUM OPINION.

Before Finnegan, *Circuit Judge*, and La Buy and Perry, *District Judges*.

Finnegan, *Circuit Judge*. Andrew G. Nelson, Inc., plaintiff, invoked a statutory three-judge district court (28 U.S.C. § 1336, § 2284, § 2325) to enjoin and annul a cease and desist order of the Interstate Commerce Commission, dated March 3, 1955, in Docket No. MC-C-1610, reported in 63 M. C. C. 407 (1955). The challenged order is a culmination of hearings initiated by the Commission under § 204(c) and § 212(a) of the Interstate Commerce Act,[1] to investigate plaintiff's operations under its permit, issued June 18, 1951, authorizing the transportation, over irregular routes of: "(N)ew and used store fixtures, new and used household goods and stock in trade of drugstores." By its own initial order the Commission made this corporate plaintiff a respondent in those proceedings instituted for the purpose of determining whether Andrew G. Nelson, Inc., is and was engaged in the transportation of commodities outside the scope of its operating authority, in violation of § 209(a) of the Act,[2] or "of any requirement, restriction, term, or condition of * * * (its) permit * * *" From the record made before the Commission it is established that the plaintiff corporation was represented by several counsel during an adversary proceeding before an examiner, at which other attorneys appeared on behalf of several intervenors.

Earlier, in March, 1942, under No. MC 1194, plaintiff's predecessor, Andrew G. Nelson, an individual, had been authorized by the Commission to conduct business as a contract carrier by motor vehicle the commodities mentioned and already quoted above in connection with the June, 1951, permit. Nelson's 1942 permit (No. MC 1194) was issued under the "grandfather" clause in the first proviso of § 209(a)(1), Part II, of the Act. Later, sometime in 1951, Nelson incorporated and with Commission approval his permit was transferred to the corporate plaintiff before us.

Plaintiff participated in the challenged administrative proceedings held by the Commission during which the Bureau of Inquiry and Compliance, Interstate Commerce Commission, introduced evidence establishing that during a period in 1953 this carrier transported in interstate commerce, commodities from consignors, none of whom were drugstores, to consignees "whose business is as indicated. Numerous and varied canned or packaged grocery items to grocery stores or warehouses; dry and liquid cream and fruit juices to food manufacturers; beer and wines to liquor distributors; 100-pound bags of dry glue to a company whose business is not stated of record; candy to a candy wholesale candy distributor; dry milk to a distributor of that product; malted milk powder and milk food to a manufacturer of drugs and dietetic foods; and automobile batteries to a general merchandising company * * *." 63 M. C. C. 407, 412.

Proceeding before us by way of a complaint for a declaratory judgment, plaintiff asks, in substance, that we review the Commission's order by measuring it with constitutional yardsticks. No problem of exhausting administrative remedies is involved. Plaintiff insists that by its order, now in issue, the Commission whittled down the operating permit originally issued under the "grandfather clause". But the Commission was investigating plaintiff's compliance or non-compliance with permit No. MC 1194, as is disclosed *inter alia* by this statement reported by the Examiner:

> "The sole issue herein is thus explicit and requires a determination of the extent of the authority granted by the commodity description '*stock* in trade of drugstores.' None of the parties claim that such description is patently ambiguous, and ambiguity may not be assumed merely from the fact that the Bureau and interveners are in disagreement with respondent as to the meaning of the description. In considering the issue thus presented neither the operations of respondent prior to the 'grandfather' date, nor the Commission's intentions with respect thereto in issuing the permit, are of any importance."

When the matter moved up to the level of Division 5 it was pointed out (63 M. C. C. 407, 409): "(W)e agree with the contention of the parties and the examiner's conclusions that there is no such patent ambiguity in the permit as to warrant our going back of it and giving consideration to events prior to its issue." We think the Commission acted within its statutory power and for that reason refuse to disturb the challenged order.

Having examined the pleadings, exhibits, record made before the Commission, after hearing oral arguments of counsel for both sides, receiving evidence on the matter of damages, and being fully advised in the premises, we find and conclude as follows:

FINDINGS OF FACT.

1. Plaintiff, Andrew G. Nelson, Inc., an Illinois corporation, operates as a motor contract carrier in ten North Central States under authority of Permit No. MC 1194, which was issued on March 13, 1942, by the Interstate Commerce Commission (hereinafter called "the Commission") to plaintiff's predecessor in interest (Andrew G. Nelson, as individual), and was authorized to be transferred to plaintiff by order dated March 12, 1951. A new permit was issued to plaintiff on June 18, 1951.

2. The aforesaid permits authorized plaintiff and its predecessor to transport *new and used store fixtures, new and used household goods*, and *stock* in trade of drug stores.

3. Pursuant to said application, the Interstate Commerce Commission in its Docket MC-1194, under date of February 14, 1938, issued its so-called compliance order reciting in part as follows:

> "After due investigation:
>
> "It appearing, That applicant in accordance with the requirements of Section 209, Motor Carrier Act, 1935, including due service, made application for a permit to operate as a contract carrier by motor vehicle according to the specification *set forth as appended on the reverse side hereof or attached hereto*, and made a part of this order, and that the said applicant or

predecessor in interest was in *bona fide* operation in such manner on July 1, 1935, and has so operated since that time; and the Commission so finding;"

The specification set forth on the reverse side of said compliance order and referred to in the foregoing quotation of said order reads as follows:

> "The business of applicant, as authorized by the order of which this is a part, in interstate or foreign commerce as a contract carrier by motor vehicle of the commodities indicated, over irregular routes, is as specified below:
>
> *New and used store fixtures, new and used household* goods, and stock in trade of drug stores.
>
> Between points and places in Illinois, Indiana, Iowa, Kentucky, Michigan, Minnesota, Missouri, Nebraska, Ohio, and Wisconsin."

The foregoing finding of the Commission made in said compliance order of February 14, 1938, has never been changed and remains in effect.

4. The Interstate Commerce Commission issued to Andrew G. Nelson under date of March 13, 1942, a permit to engage in interstate or foreign commerce as a contract carrier by motor vehicle, a portion of which permit reads as follows:

> "It is further ordered, That the transportation service to be performed by the said carrier in interstate or foreign commerce shall be as specified below:
>
> *New and used store fixtures, new and used household* goods, and *stock* in trade of drug stores, over irregular routes,
>
> Between points and places in Illinois, Indiana, Iowa, Kentucky, Michigan, Minnesota, Missouri, Nebraska, Ohio, and Wisconsin."

5. That the aforesaid permit dated March 13, 1942, was transferred to plaintiff in the manner and form required

by law, and the Interstate Commerce Commission on June 18, 1951, reissued such permit to plaintiff making no change therein except the substitution of plaintiff's name for the name of the original holder.

6. Plaintiff is and has been since 1951 engaged in the transportation of commodities in Interstate Commerce as a contract carrier, pursuant to authority granted by said permit.

7. By order entered January 21, 1954, the Commission, Division 5, instituted an investigation proceeding in its Docket No. MC-C-1610 with a view to determining whether Andrew G. Nelson, Inc., is and has been engaged in the transportation of commodities not within the scope of its operating authority, in violation of section 209(a)(1) of the Interstate Commerce Act (49 USC § 309(a)(1)), or of any requirement, restriction, term, or condition of its permit. The order further provided for the issuance of such orders and the taking of such other action as the facts and circumstances may appear to warrant.

8. A hearing was held by a hearing examiner of the Commission in May, 1954, at Chicago, Illinois.

9. The Bureau of Inquiry and Compliance of the Commission was joined in its support of the investigation by 19 motor carriers, 3 associations of motor carriers, and the Class I rail carriers in western territory.

10. During the period July 31, 1953, to December 7, 1953, the respondent transported in interstate commerce the following commodities from consignors, none of whom were drug stores, to the consignees whose business is as indicated: Numerous and varied canned or packaged grocery items to grocery stores or warehouses; dry and liquid cream and fruit juices to food manufacturers; beer and wines to liquor distributors; 100-pound bags of dry glue to a company whose business is not stated of re-

ord; candy to a wholesale candy distributor; dry milk to a distributor of that product; malted milk powder and milk food to a manufacturer of drugs and dietetic foods; and automobile batteries to a general merchandising company.

11. Plaintiff did not deny that it had engaged in the aforesaid transportation, but contended that the description "*stock* in trade of drug stores" permits transportation from and to any consignor and consignee, provided that the commodities transported are the same as those sold in drug stores.

12. The hearing examiner held that this argument was without merit because it was based on the false premise that the plaintiff's permit authorizes the transportation of "commodities described as stock in trade of drug stores." The hearing examiner further found that the commodity description under consideration is merely a different but equally effective manner of stating "drugstores" *stock* in trade"; that the limitations as thus imposed by the commodity description is not restricted to deliveries to drugstores but also includes goods which are earmarked for eventual delivery to and sale in a drugstore; and that, accordingly, plaintiff's past and continued transportation in excess of that granted by its permit, as described in Finding of Fact 6, is in violation of section 209(a)(1) of the act and should be discontinued immediately.

13. The hearing examiner further held that there is no such patent ambiguity in the commodity description "*stock* in trade of drugstores" in the permit as to warrant consideration of events prior to issuance to plaintiff's predecessor.

14. The examiner served his recommended report and order, proposing the issuance of a cease and desist order, on September 22, 1954.

15. Plaintiff filed exceptions to the examiner's recommended report and order on October 29, 1954.

16. The Commission, Division 5, issued its report (63 M. C. C. 407) on March 17, 1955, in which it found that, except as modified in its report, the examiner had adequately stated the facts and the issues, and it adopted his report and findings except as modified.

17. In ruling against plaintiff's exceptions and upholding the hearing examiner, Division 5, found that there is no such patent ambiguity in the permit as to warrant giving consideration to events prior to its issuance; that the examiner's statement and discussion of the issue is sound as regards the phrase "*stock* in trade of drugstores"; that the term "*new and used store fixtures*" is adequately defined in *Shelinsky Common Carrier Application*, 52 M. C. C. 349, at 359, and in *Mural Trucking Service Interpretation of Certificate*, 63 M. C. C. 47; that plaintiff's contention with respect to the meaning of "*household goods*" is totally without merit; that any article which is a part of the stock in trade of a mercantile establishment does not for that reason come within the meaning of "household goods," except as an incident of the movement of such establishment from one location to another, citing Commission decisions; that no inconsistency exits [*sic*] between the "intended use" test and the examiner's statement that "*stock* in trade of drugstores" means stock kept for sale purposes by one who operates a drugstore; that the equivalent of "*stock* in trade of drugstores" is "drugstores' stock in trade"; that the important determination is what transportation was intended to be authorized; that plaintiff is authorized to transport the commodities described in its permit provided such commodities at the time of shipment are definitely intended for use as "store fixtures, household goods, or stock in

trade of drugstores"; that the commodity limitation in plaintiff's permit does not limit the class or type of persons with whom it may contract, as would a "Keystone" restriction as described in *Keystone Transp. Co., Contract Carrier Application*, 19 M. C. C. 475; that the "intended use" test has never been abandoned by the Commission; and that an appropriate order requiring plaintiff to cease and desist from the operations found to be unauthorized would be entered.

18. On March 17, 1955, the Commission issued its order requiring plaintiff to cease and desist from the operations found in the report of Division 5 to be unauthorized and unlawful.

19. Plaintiff filed a petition for reconsideration and oral argument on May 11, 1955; replies to the petition were filed on June 15, 1955; and the entire Commission denied the petition by order of November 15, 1955.

20. The Court adopts as its own the findings of fact made by the Commission, Division 5, as shown in its report on March 17, 1955.

Conclusions of Law.

1. The Commission had jurisdiction to hear and determine the issues involved in the proceeding which resulted in the order here under attack.

2. This Court has jurisdiction of the action herein and the parties hereto.

3. The plaintiff was accorded a full, fair and legal hearing.

4. The findings made by the Commission, Division 5, as set forth in its report of March 17, 1955, which the Court had adopted as its own, are supported by substantial evidence of record and are adequate to support the

order issued by the Commission.

5. The Commission did not exceed its authority in issuing its said order.

6. The order of the Commission under attack in this cause is a legal and valid order.

7. The injunction prayed for by the plaintiff should be denied and the suit dismissed.

8. Let a decree be entered in accordance with the conclusions expressed herein.

Dated: 13th day of June, 1956.

S/ PHILIP J. FINNEGAN,
United States Circuit Judge.

S/ WALTER J. LA BUY,
United States District Judge.

FOOTNOTES IN NO. 55-C-2302—NELSON V. UNITED STATES, ET AL.

1. 49 U. S. C. § 304(c), 54 Stat. 922, as amended September 18, 1940; 49 U. S. C. 312(a), 54 Stat. 924, as amended Sept. 18, 1940.

2. 49 U. S. C. § 309(a)(1), 64 Stat. 575, as amended September 1, 1950.

APPENDIX D.

United States District Court
For the Northern District of Illinois,
Eastern Division.

Andrew G. Nelson, Inc., *Plaintiff,* *vs.* United States of America and Interstate Commerce Commission, *Defendants,* and Advance Transportation Co., Inc., *et al.,* *Intervening Defendants.*	No. 55 C 2302

DISSENTING MEMORANDUM OPINION.

Judge Perry, dissenting:

In the proceedings initiated by the Interstate Commerce Commission and ending in the cease and desist order dated March 3, 1955, herein sought to be enjoined annulled, the Commission, in effect, sought to modify or curtail by retroactive interpretation the permit of plaintiff corporation, an interstate motor contract carrier and successor in interest to Andrew G. Nelson whose permit was issued under the "grandfather" clause in the first proviso to Section 209(a)(1) of the Interstate Commerce Act (49 U. S. C. 309(a)(1)).

The so-called "grandfather" clause reads, in part, as follows:

> "Except as otherwise provided in this section and in section 310a of this title, no person shall engage in the business of a contract carrier by motor vehicle in interstate or foreign commerce on any public highway * * * unless there is in force with respect to such carrier a permit issued by the Commission, authorizing such person to engage in such business: *Provided*, That, subject to section 310 of this title, if any such carrier or a predecessor in interest was in bona fide operation as a contract carrier by motor vehicle on July 1, 1935, over the route or routes or within the territory for which application is made and has so operated since that time * * * the Commission shall issue such permit, without further proceedings, if application for such permit was made to the Commission as provided in sub-section (b) of this section * * *."

By its order of February 14, 1938, in "grandfather" case No. MC-1194, the Interstate Commerce Commission found that Andrew G. Nelson (plaintiff's predecessor) had made application for a permit to operate as a contract carrier by motor vehicle according to certain specifications, viz.:

> "The business of applicant, as authorized by the order of which this is a part, in interstate or foreign commerce as a contract carrier by motor vehicle of the commodities indicated, over irregular routes, is as specified below:
>
> New and used store fixtures, new and used household goods, and stock in trade of drug stores.
>
> Between points and places in Illinois, Indiana, Iowa, Kentucky, Michigan, Minnesota, Missouri, Nebraska, Ohio, and Wisconsin",

and then the Order added: "and that the said applicant or predecessor in interest was in bona fide operation *in such manner* (italics supplied) on July 1, 1935, and has so operated since that time; and the Commission so finding." That finding has never been changed, and remains in effect. In other words, the Commission's finding of fact was that the business of applicant during the "grandfather" period had been as a contract carrier of commodities described as new and used store fixtures, new and used household goods, and stock in trade of drug stores.

Now, let us turn to a consideration of some of the informational data that was on file in 1936 as a part of the record before the Commission in the "grandfather" case; data describing applicant's operations during the "grandfather" period, and on which, in part, at least, the Commission presumably based its administrative finding of fact in the order of February 14, 1938, just mentioned. Referring to plaintiff's exhibits, put into evidence herein by agreement of attorneys, we find certified, photostatic copies of the following documents:

> (a) "Property Carrier Application" dated December 30, 1935, and made by Andrew G. Nelson. An exhibit, attached to and a part of the Application, contains the following statement by applicant:
>
> "Operations involve transportation over various routes, between various municipalities, on various highways, of store fixtures and miscellaneous merchandise, and household goods of employes, for Walgreen Co., in connection with the opening, closing and remodeling of stores."
>
> (b) Statements made by Andrew G. Nelson when he appeared before Supervisor John G. Petritz on November 9, 1936, and reduced to writing and signed by him on November 11, 1936—paragraphs 7 and 8 whereof read as follows:
>
> "7. That he is an interstate contract carrier of property for the Walgreen Company and for it alone.
>
> "8. That he hauls to and from Walgreen Retail Stores located within 600 miles of Chicago. That said transportation has to do with the opening, the remodel-

ing and/or the closing of Walgreen retail stores, the commodities so transported are usually store fixtures and equipment and merchandise for the opening stock. That the household goods hauled are only for employees of the Walgreen Company and that payment for said transportation is taken care of by the Walgreen Company. This movement amounts to approximately ten trips per year. That his equipment usually returns empty, except for old store fixtures and equipment and occasionally a transfer of stock for Walgreen Company."

(c) Affidavit, dated November 12, 1935, of W. E. Henry, who states that he "is now, and has been for a number of years, engaged in the occupation of traffic manager for Walgreen * * * and that as such traffic manager it is his duty to, among other things, arrange and contract for, and order and supervise, the transportation of store fixtures and miscellaneous merchandise belonging to said Walgreen Co., and household goods of certain of said company's employees."

Affiant Henry further says "that Andrew G. Nelson * * * is on this date, and has been continuously since the year A. D. 1919, under contract with said Walgreen Co., to transport by motor vehicle over various routes, between various municipalities, on various highways, store fixtures and miscellaneous merchandise, and household goods of employes, for Walgreen Co., in connection with the opening, closing and remodeling of stores, all over such state and federal highways within a radius of approximately six hundred (600) miles from Chicago, Illinois, as may be necessary to reach a Walgreen Co., drug store.

(d) Affidavit, dated November 10, 1936, of David Harding who states that he "is now and has been since 1920 engaged in the occupation of warehouse foreman for Andrew G. Nelson * * *. That it is his duty among other things to check loads, supervise the transportation of store fixtures, miscellaneous merchandise and household goods belonging to Walgreen Company or their employees."

Affiant Harding further says "that he has ordered the various motor vehicles over various routes * * * containing store fixtures, miscellaneous merchandise and household goods belonging to Walgreen Company or their employees, in connection with the opening, closing and remodeling of stores * * *. Affiant further deposes and says the type of business done by Andrew G. Nelson * * * has not materially changed since his employment in 1920.

(e) Affidavit, dated November 10, 1936, of Jacob Jacoby who states that "he is now and has been since 1930 engaged in the occupation of chauffeur for Andrew G. Nelson, doing business as Nelson Warehouse & Express Co. * * * That it is his duty among other things to drive various vehicles containing store fixtures, miscellaneous merchandise and household goods belonging to Walgreen Company or their employees.

Affiant Jacoby further states "that he has driven various motor vehicles over various routes * * * containing store fixtures, miscellaneous merchandise and household goods belonging to Walgreen Company or their employees, in connection with the opening, closing and remodeling of stores * * * and says the type of business done by Andrew G. Nelson as Nelson Warehouse & Express Co. * * * has not materially changed since his employment in 1930.

(f) Affidavit, dated November 10, 1936, of Robert Stewart who states that "he is now and has been since 1930 engaged in the occupation of chauffeur for Andrew G. Nelson, doing business as Nelson Warehouse & Express Co. * * * That it is his duty among other things to drive various vehicles containing store fixtures, miscellaneous merchandise and household goods belonging to Walgreen Company or their employees * * *.

Affiant Stewart further states that he has "driven various motor vehicles over various routes, between various municipalities * * * containing store fixtures, miscellaneous merchandise and household goods belonging to Walgreen Company or their employees,

> in connection with the opening, closing and remodeling of stores all over such states and federal highways within the radius of approximately six hundred (600) miles from Chicago, Illinois * * * that the type of business done by Andrew G. Nelson as Nelson Warehouse & Express Co. * * * has not materially changed since his employment in 1930.

Applicant Nelson, having established the fact that he was in bona fide operation as a contract carrier by motor vehicle on July 1, 1935, and having been accordingly issued a permit by the Commission pursuant to the "grandfather" clause, was granted by statute the right and authority to continue the grandfather operations in the same pattern. The Commission has no more authority or power now to specify, limit or diminish the scope of the operations authorized under the "grandfather" permit here involved than it had in 1942 when the permit was issued.

To permit the Commission to modify or restrict by retroactive interpretation a permit issued under circumstances such as those in the instant case would be to give the permit a protean quality, subjecting the holder thereof to possible deprivation of property without due process.

The power given the Interstate Commerce Commission by Congress to make regulations is one which is limited to the enforcement and application of the statute and to the carrying into effect of the will of Congress as expressed by the statute. It was never intended that the Commission be authorized to usurp the legislative function of Congress in any manner—whether it be done directly, by the promulgation of regulations which are not in harmony with the statute, or done indirectly by an interpretation of the statute, amounting to an amendment thereof. In the case at hand the Commission is, in effect, amending the statute.

Absent any charge and supporting proof of fraud in the inducement of the issuance of a permit, the findings of the Commission in the "grandfather clause" proceedings here involved were and are final and cannot be changed or modified; nor can new and different findings be made, based upon the same facts.

/s/ J. S. Perry,
United States District Judge.

APPENDIX E.

In the United States District Court
For the Northern District of Illinois,
Eastern Division.

Andrew G. Nielson, Inc., *Plaintiff*, *vs.* United States of America and Interstate Commerce Commission, Et Al., *Defendants.*	Civil Action No. 55 C 2302

FINAL JUDGMENT AND DECREE.

The above entitled action having come on for final hearing before a duly constituted district court of three judges convened pursuant to Section 2284 and 2325 of Title 28, United States Code, and the Court having considered the pleadings and evidence, and the arguments and briefs of counsel, and the Court being fully advised in the premises and having filed its Findings of Fact and Conclusions of Law in said Action, in accordance with the said Findings of Fact and Conclusions of Law, it is hereby

Ordered, adjudged and decreed, that the relief prayed for in the complaint be, and it is hereby denied, and the complaint is dismissed.

Dated this 13th day of June, 1956.

/s/ Philip J. Finnegan,
United States Circuit Judge.

/s/ Walter J. LaBuy,
United States District Judge.

APPENDIX F.

ORDER.

At a Session of the INTERSTATE COMMERCE COMMISSION, Division 5, held at its office in Washington, D. C., on the 14th day of February, A. D. 1938

No. MC 1194.

APPLICATION OF ANDREW G. NELSON, DOING BUSINESS AS NELSON WAREHOUSE AND EXPRESS CO., CHICAGO, ILLINOIS.

After due investigation:

It appearing, That applicant in accordance with the requirements of Section 209, Motor Carrier Act, 1935, including due service, made application for a permit to operate as a contract carrier by motor vehicle according to the specification *set forth as appended on the reverse side hereof or attached hereto,* and made a part of this order, and that the said applicant or predecessor in interest was in bona fide operation in such manner on July 1, 1935, and has so operated since that time; and the Commission so finding; therefore

It is ordered, That upon full compliance with the requirements of Sections 215 and 218 of the said Act, and the rules and regulations prescribed by the Commission thereunder, *governing the filing of contract carrier rate publications and filing and approval of evidence of security for the protection of the public, and with the requirements established in Contracts of Contract Carriers,* 1 M. C. C. 628, a permit shall be issued, unless otherwise ordered, authorizing said applicant to engage in interstate or foreign commerce, as a contract carrier by motor vehicle according to the specification *set forth as appended on the reverse side hereof or attached hereto,* and made a part of this order.

It is further ordered, That in all other respects the said application shall be, and it is hereby, denied, *and that on and after 30 days from date of this order,* unless on the Commission's own motion or for good cause shown it is otherwise ordered, applicant shall not engage in any motor carrier operations not described herein or otherwise lawfully authorized.

It is further ordered, That in the event said applicant has not complied with the requirements herein *within 30 days from date of this order,* then said applicant shall show cause, if any there be, *within 60 days from the date of this order,* why said application should not be dismissed, failing in which the said application shall be dismissed without further proceedings.

And it is further ordered, That if applicant or any other party in interest desires to protest the issuance of such permit, such applicant or party in interest shall file with the Commission *within 30 days from the date of this order,* a petition setting forth the grounds relied upon in opposing the granting of such authority and requesting that the issuance of the said permit be withheld pending further investigation and order by the Commission. Otherwise such protests shall be denied.

By the Commission, division 5.

W. P. BARTEL,
Secretary.

(SEAL)

Appendix to the order of the INTERSTATE COMMERCE COMMISSION, Division 5, dated the 14th day of February, A. D. 1938.

No. MC 1194.

APPLICATION OF ANDREW G. NELSON, DOING BUSINESS AS NELSON WAREHOUSE AND EXPRESS CO., CHICAGO, ILLINOIS.

The business of applicant, as authorized by the order of which this is a part, in interstate or foreign commerce as a contract carrier by motor vehicle of the commodities indicated, over irregular routes, is as specified below:

New and used store fixtures, new and used household goods and *stock* in trade of drug stores,

Between points and places in Illinois, Indiana, Iowa, Kentucky, Michigan, Minnesota, Missouri, Nebraska, Ohio, and Wisconsin.

FILED
OCT 1 [illegible]
JOHN T. FEY, Clerk

No. [illegible]

In the Supreme Court of the United States

OCTOBER TERM, 1956

ANDREW G. NELSON, INC., APPELLANT

v.

UNITED STATES OF AMERICA, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

MOTION TO AFFIRM

J. LEE RANKIN,
Solicitor General,
VICTOR R. HANSEN,
Assistant Attorney General,
DANIEL M. FRIEDMAN,
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Department of Justice,
Washington 25, D. C.

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General Counsel,
JAMES Y. PIPER,
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In the Supreme Court of the United States

OCTOBER TERM, 1956

No. 366

ANDREW G. NELSON, INC., APPELLANT

v.

UNITED STATES OF AMERICA, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

MOTION TO AFFIRM

Pursuant to Rule 16, Paragraph 1(c), of the Revised Rules of this Court, appellees United States of America and Interstate Commerce Commission move that the judgment of the district court be affirmed.

This is a direct appeal from a final judgment entered June 13, 1956, by a three-judge district court convened pursuant to 28 U.S.C. 2284 and 2325. The judgment dismissed appellant's complaint which sought to set aside an order of the Interstate Commerce Commission directing appellant to cease and desist from conducting certain motor carrier operations found to be unauthorized by its contract carrier's permit.

QUESTIONS PRESENTED

1. Whether the Interstate Commerce Commission misinterpreted the scope of the contract carrier permit which it had issued to appellant's predecessor.

2. Whether the findings of fact made by the Commission were adequate.

3. Whether the Commission's order was vague and indefinite.

STATEMENT

In 1942 the Interstate Commerce Commission issued to appellant's predecessor a contract carrier's "grandfather" permit authorizing the transportation by motor vehicle of "*new and used store fixtures, new and used household goods* and *stock* in trade of drug stores." Appellant's present permit, containing the same authorization, was issued to it in 1951 upon the incorporation of its business.

In 1954 the Commission instituted an investigation to determine whether appellant was transporting commodities not authorized by its permit. After full administrative proceedings, the Commission held that appellant had conducted unauthorized operations (63 M.C.C. 407), and issued a cease-and-desist order. The Commission ruled (*id.*, p. 411) that the phrase "*stock* in trade of drug stores" in appellant's permit authorized only the transportation of merchandise actually or ultimately destined for drugstores, and not of merchandise which, although of the kind that might be stocked in drug stores, was not in fact so destined.

On appeal, a three-judge district court (one judge dissenting) upheld the Commission's cease-and-desist order. The court rejected appellant's contention that the order had "whittled down" appellant's "grandfather" permit; held that appellant had been accorded a full and fair hearing; and ruled that the Commission's findings were supported by substantial evidence.

ARGUMENT

1. Appellant's principal contention (Jurisdictional Statement, 14-21) is that the Commission has misinterpreted its own permit. It argues that the phrase "*stock in trade of drug stores*" is not limited, as the Commission held, to merchandise actually destined for drug stores, but covers any merchandise which may be stocked by drug stores.

We submit, however, that the Commission correctly concluded that appellant's permit authorizes it to carry only stock in trade which is intended for drug stores, and not all merchandise which conceivably might be sold there. Appellant's interpretation of its permit would authorize the carriage of all the myriad commodities which a modern drug store handles, such as electrical appliances and equipment, phonograph records, cameras, books, athletic equipment, hardware, etc. In short, appellant would broaden the grant of limited operating authority contained in the original permit to the point where it would almost constitute authority to haul general commodities.

Appellant contends that the phrase "stock in trade of drug stores" was intended as a commodity description, and that the Commission, by construing the phrase with reference to the intended use to be made of the commodities, has in fact curtailed the scope of the original operating authority. But construing a permit "takes no rights" away from the operator; it "merely interpret[s] what rights he had from the beginning." *Willers* v. *United States*, 133 F. Supp. 270, 275

(D.S.D.). The Commission "from the beginning of motor-carrier regulation has identified the commodities authorized to be transported in three principal ways: * * * (c) by reference to the intended future use." *C & H Transp. Co.*, 62 M.C.C. 586, 587. The "intended use" standard has been sustained by the courts (*Dart Transit Co.* v. *Interstate Commerce Commission*, 110 F. Supp. 876 (D. Minn.), affirmed, 345 U.S. 980; *Converse* v. *United States*, 109 F. Supp. 807 (N.D. Cal.)), and the Commission did not err in applying it in interpreting appellant's permit. Finally, since the Commission held that the commodity description was not ambiguous, it was not required to consider the alleged actual operations conducted by appellant's predecessor during the grandfather period. See *Bingler Vacation Tours* v. *United States*, 132 F. Supp. 793, 796 (D.N.J.), affirmed, 350 U.S. 921; *Pomprowitz* v. *United States*, 119 F. Supp. 824, 827 (E.D. Wisc.), affirmed, 348 U.S. 803.

It is well settled that the Commission's interpretation of its own permits and certificates is controlling unless clearly unreasonable.[1] Plainly, the Commission was not unreasonable in construing appellant's permit as authorizing only the transportation of stock in trade intended for drug stores. In any event, the meaning of the particular phrase used in this permit is not a question of sufficient substance to warrant further review by this Court.

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[1] *United Truck Lines* v. *Interstate Commerce Commission*, 189 F. 2d 816, 817 (C.A. 9), certiorari denied, 342 U.S. 830; *Adirondack Transit Lines* v. *United States*, 59 F. Supp. 503, 504 (S.D.N.Y.), affirmed, 324 U.S. 824; *Malone Freight Lines, Inc.* v. *United States*, 107 F. Supp. 946, 949 (N.D. Ala.), affirmed, 344 U.S. 925; *Converse* v. *United States*, 109 F. Supp. 807, 808 (N.D. Cal.); *Dart Transit Co.* v. *Interstate Commerce Commission*, 110 F. Supp. 876, 880 (D. Minn.), affirmed, 345 U.S. 980; *Salvino* v. *United States*, 119 F. Supp. 277, 281 (W.D. Wash.).

2. Appellant next contends (Jurisdictional Statement, 21-23) that the Commission erred in failing to make adequate findings with respect to (a) the operations actually conducted during the grandfather period, and (b) whether the other portions of its permit, which authorizes carriage of "store fixtures" and "household goods," cover the transportation here involved.

As we have noted (*supra*, p. 4), since the provision relating to "stock in trade of drug stores" is not ambiguous, the Commission was not required to consider —or to make findings concerning—actual operations during the grandfather period. Moreover, the examiner (whose report the Commission adopted with minor modifications, Jurisdictional Statement, 34) did make findings with respect to the circumstances surrounding the original issue of the permit (Jurisdictional Statement, 38-39), and those findings refute appellant's contention that the permit gave it less authority than it was entitled to.

With respect to the contention as to "store fixtures" and "household goods," the Commission specifically found (Jurisdictional Statement, 30-31) that the commodities which appellant had carried did not come within those categories. Further, it cannot seriously be contended that such commodities as canned or packaged grocery items, milk products, beer and wine, glue, and automobile batteries (Jurisdictional Statement,

35) constitute either "store fixtures" or "household goods."[2]

3. Finally, appellant argues (Jurisdictional Statement, 23-24) that the Commission's order is vague and indefinite. The order (Jurisdictional Statement, 42) directed appellant to cease and desist "from the operations * * * found in said report to be unauthorized and unlawful." In its report, the Commission found (Jurisdictional Statement, 33-34) that appellant's transportation of "commodities which at the time of their movement are not, or are not intended to become, part of the stock in trade of a drug store" was unlawful and should be discontinued. Similar cease-and-desist orders consistently have been upheld as not unduly vague. *Brady Transfer & Storage Co.* v. *United States*, 80 F. Supp. 110, 118 (S.D. Iowa), affirmed, 335 U.S. 875; *Consolidated Flower Shipments* v. *Civil Aeronautics Board*, 213 F. 2d 814, 818 (C.A. 9); cf. *Arrowhead Freight Lines, Ltd.* v. *United States*, 115 F. Supp. 537, 545 (S.D. Calif.).

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[2] Each of the forty-eight shipments proved at the hearing consisted of a full truckload of one of the commodities indicated (Tr., Ex. 2).

CONCLUSION

For the foregoing reasons, we submit that the decision below is correct and that this appeal presents no substantial questions. The judgment of the district court should be affirmed.

Respectfully submitted,

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VICTOR R. HANSEN,
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Interstate Commerce Commission.

SEPTEMBER 1956.

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IN THE

Supreme Court of the United States

October Term, 195~~6~~7

No. ~~266~~ 16

ANDREW G. NELSON, INC.,
Appellant,

vs.

UNITED STATES OF AMERICA, Et Al.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS.

REPLY TO MOTION TO AFFIRM.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1956.

No. 366.

ANDREW G. NELSON, INC.,

Appellant,

vs.

UNITED STATES OF AMERICA, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS.

REPLY TO MOTION TO AFFIRM.

The points made in the Government's[1] Motion to Affirm will be replied to in order.

1. The Government's reasoning seems to be (a) the Commission's rulings are presumptively correct; (b) its interpretation of the phrase "*stock* in trade of drug stores" in appellant's permit was correct even without the presumption; and, in any event, (c) the meaning of such an isolated phrase in a particular permit is not a question with which this Court need be concerned. However, in its attempt to under-play the significance of this case,

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[1] The United States and the Interstate Commerce Commission have filed a joint motion to affirm and will be referred to, collectively, as the Government.

the Government has ignored the really important questions involved—questions that do deserve this Court's consideration.

To be sure, appellant does believe that the Commission erroneously interpreted the commodity description in its permit but also inextricably involved in this case are such questions as: (1) whether or not, under the guise of interpretation, appellant has been deprived of operating rights guaranteed by Section 209 (a) of the Interstate Commerce Act, Part II; (2) whether or not the Commission can ignore evidence concerning events underlying the issuance of appellant's permit in ruling that appellant has transported commodities not authorized by that permit; (3) whether or not the Commission can construe the plain language of the permit in the light of a refinement in its commodity description technique subsequently developed to effectuate a new policy; (4) whether or not the Commission's action violates the precepts of this Court's decision in *United States v. Seatrain Lines*, 329 U. S. 424 (1947); (5) whether or not the district court's affirmance of the Commission's action involves a conflict with *Salvino v. United States*, 119 F. Supp. 277 (W. D. Wash., 1954) and *Bird Trucking Co. v. United States*, decided September 26, 1955 (W. D. Wis.), 11 Federal Carriers Cases, par. 81,028; and (6) whether or not the Commission's report and order run afoul of the requirements of the Administrative Procedure Act.

In order to put these questions in their proper perspective, we should consider the Commission's purpose in attacking appellant's operations in this case. Since the beginning of motor carrier regulation, the fact that a substantial number of carriers had grandfather rights under Section 209 (a) of the Interstate Commerce Act, Part II, has caused the Commission considerable difficulty. Applications for grandfather permits were handled informally in most cases (*Coastal Tank Lines, Inc.* v. *Charlton Bros. Transp. Co., Inc.*, 48 M. C. C. 289, 295 (fn. 3) (1948)), and the Commission had trouble in attempting to classify the operations of carriers who had grandfather rights (*Classification of Motor Carriers of Property*, 2 M. C. C. 703 (1937)). As a result, the Commission perhaps was not as careful as it should have been in choosing language to describe the commodities authorized to be transported in the early grandfather permits. *Descriptions in Motor Carrier Certificates*, 61 M. C. C. 209, 211 (1952). Later, the Commission realized that its carelessness had been a mistake. Because the Commission was required by law to issue to grandfather carriers permits commensurate with the scope of their business during the grandfather period, it had no means of regulating or restricting their operations except by making sure that their permits accurately described their grandfather operations so as to grant no more operating authority than the mandate of Congress required. See the concurring opinion of Chairman Eastman in *Keystone Transp. Co. Contract Carrier Application*, 19 M. C. C. 475, 498-499 (1939). In an effort to mitigate the effect of its earlier carelessness on its future regulatory policies, the Commission began to devise ways of restricting the scope of grandfather carriers' operations—sometimes exceeding its statutory authority and necessitating restraining action by the courts.[2] Therefore, because of the history of the Commission's approach toward holders of grandfather permits, it can reasonably be assumed that, in initiating the investigation which ultimately led to the order under review, the Commission's underlying purpose was to constrict as much as possible the scope of appellant's operating authority inasmuch as that operating authority was broader than the Commission's current policies would have permitted.[3]

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[2] See the discussion of this subject in the Jurisdictional Statement, pp. 15-21. See also the perspicacious concurring opinion of Judge Fee in *Johnson* v. *United States*, 41 F. Supp. 188, 190 (Oregon 1941).

Once the Commission's underlying purpose is understood, the evils inherent in the strategy and tactics by which it accomplished its purpose also became apparent. Appellant's predecessor was authorized, in 1942, to haul "*stock* in trade of drug stores." The Commission now interprets this phrase to mean "stock in trade *intended for* drug stores." (Motion to Affirm, p. 4. Italics supplied.) The contrast between these two phrases is striking. The Commission arrived at its so-called interpretation by (a) applying its subsequently developed intended use test and (b) by refusing to consider evidence as to the events underlying the issuance of appellant's permit either as an aid to construction or, if its construction is correct, as an indication that appellant's permit is not as broad as the nature of its predecessor's business during the grandfather period warranted. The Government begs the question when it states that construing a permit merely determines what rights a carrier had from the beginning. (Motion to Affirm, p. 3.) If, in fact, the Commission's so-called interpretation of appellant's permit deprives it of operating rights granted either by the language of the permit[4] or by the grandfather clause of the Interstate Commerce Act,[5] its action is unreasonable and unlawful and must be condemned now, before appellant's business is ruined[6] and before other carriers are subjected to similar treatment.

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[3] Appellant's assumption with respect to the Commission's purpose is supported by the fact that this whole proceeding was initiated in 1954 by an order of the Commission which, when reduced to its lowest terms, recited that appellant had been hauling certain enumerated commodities not within the scope of its permit and then ordered a hearing to be held to determine whether or not appellant had been hauling commodities not within the scope of its permit. (R. 23.) Obviously, such an order presaged a foregone conclusion that appellant had violated the terms of its permit and indicated that the hearing would be a mere formality. If the Commission had been convinced (as apparently it was) that appellant's operations were *ultra vires*, the most direct approach would have been to apply to the district court for an injunction under Section 222 (b) of Part II of the Interstate Commerce Act (49 U. S. C. 1952 ed., Section 322 (b)). Instead, the Commission chose to initiate an investigation under Section 204 (c) of the Act—a proceeding which would appear to be appropriate only where the Commission was seeking facts, not where it already had sufficient details concerning the alleged violations to draw what amounted to a bill of particulars. No doubt the Commission chose this method of attacking appellant's operations because it had been denied an injunction in an almost identical situation by the same district court to which it would have had to apply for an injunction against appellant. *Interstate Commerce Commission* v. *Ratner*, decided April 15, 1947 (N. D. Ill.), 6 Federal Carriers Cases, par. 80,415. By choosing to bring the case up through its own administrative tribunal, the Commission was able to approach the district court (and now approaches this Court) with the benefit of a presumption of the correctness of its own interpretation of appellant's permit. (Motion to Affirm, p. 4.)

(a) Appellant objects to the application of the intended use test to its permit because it is a test which was devised subsequent to the issuance of the permit[7] to effectuate a new policy of the Commission[8] and because, as applied to appellant's permit, it changes the meaning of the plain language of the permit.[9]

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[4] If, inadvertently, the permit granted operating rights in excess of what the Commission intended, the error cannot be corrected at this time under the guise of interpretation. *Coastal Tank Lines, Inc. v. Charlton Bros. Transp. Co., Inc.*, 48 M. C. C. 289, 302 (1949).

[5] If the challenged commodities are of the same kind as were hauled during the grandfather period, appellant has a right to haul them now, regardless of what the language of the permit is now construed to mean. *Bison Freight Lines v. Northwest Dispatch, Inc.*, 60 M. C. C. 506 (1954).

[6] As interpreted by the Commission, appellant's permit, insofar as it relates to authority to haul "*stock* in trade of drug stores", is meaningless. It would be impossible, business-wise, to require interstate shippers of such merchandise as is sold in drug stores to earmark their merchandise for drug stores rather than, for example, department stores.

[7] Despite the Commission's self-serving declaration (quoted by the Government in its Motion to Affirm, p. 4) that it has defined authorized commodities by their intended use "from the beginning", we have been unable to find (and the Commission has never cited) any application of such a test prior to *England Transp. Co., Inc., Extension—Mississippi Points*, 49 M. C. C. 567

(b) Appellant also feels that it is very important to establish the role of evidence concerning events underlying the issuance of grandfather permits in the construction of those permits. This evidence is of two types (both of which are involved in this case): (1) evidence of the nature of the grandfather operations and (2) evidence of the circumstances surrounding the issuance of the permit. The first is important in determining whether the permit granted accurately reflected the grandfather operations, as it was required by law to do; both are important in determining what was intended by the particular language used in the permit.

At the beginning of the hearing before the Commission's examiner, the Bureau of Inquiry and Compliance's counsel took the position that evidence concerning appellant's predecessor's grandfather operations was admissible because the language of the permit was ambiguous. (R. 155.) Presumably, this was done because much of the

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(1949), and it was not then well enough developed to be labelled as such in that case. (See Jurisdictional Statement, p. 17, fn. 10.) Moreover, the Commission has said that an intended use commodity description is one which is coupled with a "Keystone" restriction, *i. e.*, one which restricts the class of shippers for whom the described commodities can be hauled (*Dart Transit Co.—Modification of Permit*, 49 M. C. C. 607, 612 (1949)); whereas appellant's permit, though issued in 1942 when "Keystone" restrictions were well known (see Jurisdictional Statement, p. 16), contains no such restriction and none can be implied (*Vidas Contract Carrier Application*, 62 M. C. C. 106, 107 (1953)).

[8] See the discussion of this problem in the Jurisdictional Statement, pp. 17-20.

[9] The Commission has said that restrictions on operating authority must be expressed in the permit, not implied. *Coastal Lines, Inc.*, v. *Charlton Bros. Transp. Co., Inc.*, 48 M. C. C. 289, 299 (1948); *Atlantic Freight Lines, Inc.—Petition for Declaratory Order*, 51 M. C. C. 175, 188-189 (1949).

Commission's documentary evidence indicated that Nelson's grandfather operations were restricted to hauling for Walgreen Drug Stores. (Jurisdictional Statement, p. 8.) However, during the hearing, Nelson explained (1) that his operations had actually been much broader and (2) that the documentary evidence had been virtually dictated by the Commission's own personnel, who told Nelson that that was all he needed to submit to get the kind of permit he wanted. (Jurisdictional Statement, pp. 7-9.) In the face of this testimony, the Bureau changed its position before the Commission and claimed that no underlying evidence should be considered because the permit was unambiguous. (Jurisdictional Statement, p. 30.) Both the hearing examiner and the Commission agreed with the Bureau, although the examiner did make findings which were based upon that portion of the documentary evidence which supported the Commission's position and wholly ignored both documentary evidence favorable to appellant and Nelson's explanatory testimony without even mentioning it to reject it. (Jurisdictional Statement, pp. 30, 36, 38-39.) This cavalier treatment of the underlying evidence should not be permitted simply because the Commission ultimately decided to rule that the language of the permit was unambiguous.[10] Practically all of the documentary evidence and testimony presented at the hearing by both sides related to events preceding the issuance of the permit and, as a practical matter, the Commission and the courts almost always consider such evidence in construing grandfather permits. See, for example, *Black v. Interstate Commerce Commission*, 167 F. 2d 825 (C. A. 5, 1948), certiorari denied, 335 U. S. 818; *Salvino v. United States*, 119 F. Supp. 277 (W. D. Wash., 1954); *Bison Freight Lines v. Northwest Dispatch, Inc.*, 60 M. C. C. 506 (1954).

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[10] The Government cites two cases in support of its contention that the underlying evidence was properly ignored. (Motion to Affirm, p. 4.) In *Bingler Vacation Tours*, the phrase to be interpreted had a well-established meaning when the certificate was issued. There has never been any suggestion that "*stock* in trade of drug stores" had such a meaning. In *Pomprowitz*, the Commission itself had used evidence of the carrier's grandfather operations to show that his construction of the permit did not conform to the limited scope of those operations. See *Pomprowitz Extension—Packing House Products*, 51 M. C. C. 343 (1950). Thus the Commission apparently considers a permit ambiguous or unambiguous, depending on which serves its own purpose.

Evidence concerning Nelson's grandfather operations should have been considered for two reasons. First, Nelson had applied for a permit to haul *general merchandise* (exactly what the evidence shows he was in the business of hauling), but, in its compliance order, the Commission recited that he had applied for a permit to haul *stock in trade of drug stores*, found that he had operated in such manner, and ordered the permit issued accordingly. (Jurisdictional Statement, pp. 8-10.) This alone indicates such an ambiguity in the circumstances surrounding the issuance of the permit as to warrant consideration of the nature of the grandfather operations in construing the intent of the Commission in issuing the permit. *Salvino v. United States, supra*, p. 284. Second, even if the Commission had intended to issue a permit limiting Nelson's operations to hauling stock in trade *intended for* drug stores, the operating authority would not have been co-extensive with Nelson's grandfather operations, as required by Section 209 (a) of the Interstate Commerce Act, Part II, and appellant would be entitled to have its permit altered accordingly.[11] *Johnson Truck Service v. Salvino*, 63 M. C. C.

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[11] The Government accuses appellant of seeking an interpretion that would permit appellant to haul all merchandise which "conceivably" might be sold in drug stores, which would be tantamount to a general commodity authorization in view of the myriad commodities now handled by drug stores. (Motion to Affirm, p. 3.) Actually, appellant claims only the right to transport commodities "ordinarily" found for sale in drug stores. (Jurisdictional Statement, pp. 14-15.) The question of whether

1 (1954); *Grifall Common Carrier Application*, 62 M. C. C. 763 (1954); *Fleetlines, Inc. v. Osbourn Trucking Co.*, 54 M. C. C. 221, 229 (1952). The Commission can refuse to consider evidence concerning grandfather operations only if a permit accurately reflects those operations. *Atlantic Frt. Lines, Inc.—Petition for Declaratory Order*, 51 M. C. C. 175, 191 (1949).

As we pointed out in the Jurisdictional Statement (pp. 19-20), the three-judge district courts in the *Salvino* and *Bird* cases refused, in circumstances similar to those involved in this case, to allow the Commission (1) to ignore evidence concerning events which preceded the issuance of the grandfather permits whose interpretation was in question and (2) to construe the language of those permits in the light of definitions and policies evolved after they were issued. The Commission's action in this case (and the affirmance of that action by two of the three judges of the district court) is squarely in conflict with the principles enunciated in those cases. Resolution of that conflict by this Court is important to all holders of grandfather permits or certificates.

We might add that, to appellant, there was no ambiguity in the phrase "*stock* in trade of drug stores" until the Commission insisted upon superimposing the intended use test in construing the phrase. Therefore, the problem of ambiguity and the consequent necessity of examining the evidence underlying the use of that language in the permit was created by the Commission itself.

---

or not appellant can transport commodities ordinarily found for sale in drug stores today, but not when its permit was issued in 1942, is not involved in this case because there was uncontroverted testimony at the Commission hearing to show that the commodities allegedly hauled in violation of appellant's permit were carried as part of drug stores' stock in trade then as well as now. (R. 254-257, 264, 273.)

2. Appellant contends not only that the Commission failed to make findings concerning grandfather operations as the Government seems to assume (Motion to Affirm, p. 5), but also that, even if the examiner's findings are considered to have been adopted by the Commission (a doubtful point—see Jurisdictional Statement, fn. 21), they are unsupported by substantial evidence. (Jurisdictional Statement, pp. 21-22.)

3. Appellant's objections as to the vagueness and indefiniteness of the Commission's cease and desist order are not captious. The go not to the fact that the injunctive provisions of the order are contained in its report, by reference, but to the fact that the report itself is extremely confusing. (See Jurisdictional Statement, pp. 23-24.) None of the cases cited by the Government (Motion to Affirm, p. 6) involved cease and desist orders which referred to reports as full of uncertainties as is the one with which appellant would be expected to comply.

CONCLUSION

Appellant's only protection against the Commission's effort to implement its current policies is the Congressional mandate to the effect that the holders of grandfather permits are entitled to carry on operations commensurate in scope with the grandfather operations upon which their permits are based and the duty and power of the courts to review the Commission's action in order to make sure that the Congressional mandate has been followed. *East Texas Motor Freight Lines v. Frozen Food Express*, 351 U. S. 49. In addition, the questions involved in this case are far broader than the mere interpretation of the special language of appellant's permit.

For these reasons, appellant requests that this Court deny the Government's Motion to Affirm and note probable jurisdiction.

Respectfully submitted,

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Victor E. Lewis,
Edward W. Rothe,
Counsel for Appellant.

October, 1956.

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No. 16

IN THE

Supreme Court of the United States

October Term, 1957.

ANDREW G. NELSON, INC.,
Appellant,

vs.

UNITED STATES OF AMERICA, *Et Al.*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS.

BRIEF FOR APPELLANT.

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IN THE
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October Term, 1957.

No. 16

ANDREW G. NELSON, INC.,
Appellant,

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UNITED STATES OF AMERICA, *Et Al.*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS.

BRIEF FOR APPELLANT.

OPINIONS BELOW.

The opinion of the Interstate Commerce Commission is reported at 63 M.C.C. 407.

The memorandum opinion of the United States District Court for the Northern District of Illinois is reported at 150 F. Supp. 181. Judge Perry's dissenting memorandum opinion is reported at 150 F. Supp. 186.

JURISDICTION.

This is an appeal from the judgment of a district court of three judges dismissing appellant's suit for an injunction against a cease and desist order of the Interstate Commerce Commission, brought under Sections 1336 and 2325 of Title 28 of the United States Code (28 U.S.C. 1952 ed., Secs. 1336 and 2325).

The judgment was entered on June 13, 1956; notice of appeal was filed on July 2, 1956; the case was docketed and the record was filed in this Court on August 31, 1956; and this Court noted probable jurisdiction on November 13, 1956.

Jurisdiction is conferred upon this Court by Section 1253 of Title 28 of the United States Code (28 U.S.C. 1952 ed., Sec. 1253).

STATUTES INVOLVED.

Motor Carrier Act, 1935 (Act of August 9, 1935, c. 498, 49 Stat. 543):[1]

> Sec. 209. (a) [as amended by Act of June 29, 1938, c. 811, Sec. 9, 52 Stat. 1238] Except as otherwise provided in this section and in section 210(a), no person shall engage in the business of a contract carrier by motor vehicle in interstate or foreign commerce on any public highway or within any reservation under the exclusive jurisdiction of the United States unless there is in force with respect to such carrier a permit issued by the Commission, authorizing such person to engage in such business: *Provided*, That, subject to section 210, if any such carrier or a predecessor in interest was in *bona fide* operation as a contract carrier by motor vehicle on July 1, 1935, over the route or routes or within the territory for which application is made and has so operated since that time, * * * except * * * as to interruptions of service over which the applicant or its predecessor in interest had no control, the Commission shall issue such permit, without further proceedings, if application for such permit is made to the Commission as provided in paragraph (b) of this section and within one hundred and twenty days after this section shall take effect and if such carrier was registered on July 1, 1935, under any code of fair competition requiring registration, the fact of registration shall be evidence of bona fide operation to be

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[1] Now cited as part II of the Interstate Commerce Act. Act of September 18, 1940, c. 722, Sec. 15, 54 Stat. 919.

considered in connection with the issuance of such permit. (49 U.S.C. 1952 ed., Sec. 309.)

(b) [as amended by Act of June 29, 1938, c. 811, Sec. 11, 52 Stat. 1238] * * * The Commission shall specify in the permit the business of the contract carrier covered thereby and the scope thereof and shall attach to it, at the time of issuance, and from time to time thereafter, such reasonable terms, conditions, and limitations consistent with the character of the holder as a contract carrier as are necessary to carry out, with respect to the operations of such carrier, the requirements established by the Commission under section 204(a)(2) and (6): *Provided, however*, That no terms, conditions, or limitations shall restrict the right of the carrier to substitute or add contracts within the scope of the permit, or add to his or its equipment and facilities, within the scope of the permit, as the development of the business and the demands of the public may require.

Sec. 212. (a) Certificates, permits, and licenses shall be effective from the date specified therein and shall remain in effect until suspended or terminated as herein provided. Any such certificate, permit, or license may * * * upon complaint, or on the Commission's own initiative, after notice and hearing, be suspended, changed, or revoked, in whole or in part, for willful failure to comply with any provision of this part, or with any lawful order, rule or regulation of the Commission promulgated thereunder, or with any term, condition, or limitation of such certificate, permit, or license * * *.

Administrative Procedure Act (Act of June 11, 1946, c. 324, 60 Stat. 237):

Sec. 8. In cases in which a hearing is required to be conducted in conformity with section 7—

* * *

(b) SUBMITTALS AND DECISIONS

* * *

All decisions * * * shall become part of the record and include a statement of (1) findings and conclusions, as well as the reasons or basis therefor, upon all the material issues of fact, law, or discretion presented on the record * * *. (5 U.S.C. 1952 ed., Sec. 1007.)

Sec. 10.

* * *

(e) SCOPE OF REVIEW.—So far as necessary to decision and where presented the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of any agency action. It shall * * * (B) hold unlawful and set aside agency action, findings, and conclusions found to be (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) contrary to constitutional right, power, privilege, or immunity; (3) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (4) without observance of procedure required by law; (5) unsupported by substantial evidence in any case subject to the requirements of sections 7 and 8 or otherwise reviewed on the record of an agency hearing provided by statute; or (6) unwarranted by the facts to the extent that the facts are subject to trial *de novo* by the reviewing court. In making the foregoing determinations the court shall review the whole record or such portions thereof as may be cited by any party, and due account shall be taken of the rule of prejudicial error. (5 U.S.C. 1952 ed., Sec. 1008.)

QUESTIONS PRESENTED.

I. Whether or not the Commission has the power retroactively to amend a grandfather contract carrier's permit under the guise of interpretation, contrary to Section 212 (a) of part II of the Interstate Commerce Act, (1) by substituting a description of authorized commodities by reference to their use for a description of authorized commodities by reference to places where they are sold and (2) by permitting the transportation of such commodities only when earmarked for such use.

II. Whether or not the Commission has the power to interpret a grandfather permit in such a manner as to render the authorized operations less broad in scope than the business carried on by the carrier during the grandfather period, in view of the guaranty of substantial parity of operations in Section 209 (a) of part II of the Interstate Commerce Act.

III. Whether or not the Commission's cease and desist order is unlawful under the Administrative Procedure Act for lack of findings and conclusions regarding all material issues, as required by Section 8 (b), and because it is arbitrary, capricious, etc., in violation of Section 10 (e).

STATEMENT.

On March 13, 1942, the Interstate Commerce Commission issued to Andrew G. Nelson, doing business as Nelson Warehouse & Express Company, a motor contract carrier permit to transport, within a ten state area, the following commodities (I.C.C. Ex. 7;[2] R. 215, 232-233):

> *New and used store fixtures, new and used household goods*, and *stock* in trade of drug stores * * *.

In 1951, Nelson incorporated his business under the name Andrew G. Nelson, Inc. (R. 72-73, 160), and on June 18, 1951, the Commission issued a new permit to the corporation (appellant), embracing the same operating rights as the old permit (D.C. Ex. 3;[2] R. 28, 274).

On January 21, 1954, the Commission initiated a proceeding entitled *Andrew G. Nelson, Inc.—Investigation of Operations* by issuing an order which (1) recited the commodity authorization of appellant's permit, (2) stated:

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[2] Exhibits for both parties were introduced and identified, serially, by numerals at the District Court hearing as well as at the Interstate Commerce Commission hearing. To avoid confusion, references to exhibits will be made according to the proceeding in which they were introduced.

> *It further appearing*, That said Andrew G. Nelson, Inc., has been and is transporting as a contract carrier by motor vehicle in interstate commerce between points and places in the above-described area various commodities not within the scope of the commodity description,

(3) listed the commodities allegedly hauled in violation of the permit, and (4) ordered an investigation under Sections 204 (c) and 212 (a) of part II of the Interstate Commerce Act, in order to determine whether or not appellant was transporting commodities not within the scope of its operating authority, in violation of Section 209 (a) of the Act or of any restriction in appellant's permit. (D.C. Ex. 1; R. 38, 46.)

The matter was referred to one of the Commission's hearing examiners and a hearing was held at Chicago, Illinois, in May, 1954. (D.C. Fdg. No. 8; R. 280.) Various interested parties intervened to support the position of the Commission's Bureau of Inquiry and Compliance, none of whom have come to this Court. (D.C. Fdg. No. 9; R. 280-281.)

It was undisputed that appellant had, between July 31 and December 7, 1953, transported in interstate commerce for consignors (none of which was a drug store in the conventional sense) the following commodities to the following consignees (D.C. Fdg. No. 10; R. 281; I.C.C. Ex. 2; R. 65, 221-226; R. 55, 57-64):

Commodities	*Business of Consignees*
canned or packaged grocery items	grocery stores or warehouses
dry and liquid cream and fruit juices	food manufacturers
beer and wines	liquor distributors
dry glue	manufacturers of gummed products
candy	wholesale candy distributor
dry milk	dry milk distributor
malted milk powder, milk food, drugs and medicine	manufacturers of drugs and dietetic foods
automobile batteries	department stores
fibreboard boxes	dairy
kitchen, storage or wardrobe cabinets or lockers	not indicated in record

On the other hand, the Bureau raised no question but that these commodities constitute part of the stock in trade of drug stores,[3] but contended that such commodities could not be transported under appellant's authority to haul "*stock* in trade of drug stores" unless, when accepted for shipment, they either were already part of the stock in trade of a particular drug store or were earmarked or intended for use as stock in trade of a drug store.[4] (Examiner's report; R. 241-242.)

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[3] Albert Koehler, manager of Walgreen Drug Stores' inventory department and an employee for 31 years, testified that Walgreen carries all of the commodities allegedly hauled by appellant in violation of its permit as part of its regular stock in trade, that the nature of Walgreen's inventory had not changed much in the preceding ten to fifteen years, and that other drug stores carry essentially the same stock as Walgreen. (R. 118-121, 125, 132.) In the ten states covered by appellant's permit, Walgreen operates 234 drug stores. (R. 117-118.)

Nelson's permit had been issued under the so-called grandfather clause of Part II of the Interstate Commerce Act. (R. 277.) At the hearing, the Bureau took the position that the permit was ambiguous and, therefore, should be interpreted in the light of the grandfather operations which it was required to reflect. (R. 50-52.) As evidence of the nature of those operations the Bureau incorporated by reference the entire record of the Commission in the grandfather permit application proceeding (Docket No. MC-1194).[5] (R. 53.) On the other hand, appellant took the position that the permit was not ambiguous and that it should be interpreted without reference to evidence of the underlying grandfather operations. (R. 115-116.) Nevertheless, in order to give a more complete picture of Nelson's grandfather operations in case the permit was found to be ambiguous, appellant introduced into evidence Nelson's N.R.A. Certificate of Registration (I.C.C. Ex. 4; R. 215, 229) and the testimony of Andrew G. Nelson himself (R. 72-100, 133-166). The events preceding the issuance of Nelson's grandfather permit, as established by the evidence introduced by both parties, may be summarized as follows:

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[4] Before the hearing examiner, counsel for the Commission's Bureau of Inquiry and the Compliance stated the Commission's position as follows (R. 53):

> * * * it is our position that * * * there may be one or more items which come under new and used store fixtures but principally it is stock in trade of drug stores, so that the commodities named in the Order we claim are not authorized by the term stock in trade of drug stores unless they are when accepted by the carrier for shipment, earmarked or intended for use as stock in trade of a drugstore, and that those commodities are not authorized when they are transported for other individuals who distribute them through other sources than drug stores; in other words, it is the Commission's position that the intended use theory applies to this [e] case, in the construction of this authority.

[5] Although the entire record in the grandfather application proceeding was incorporated by reference, the Bureau introduced into evidence only selected documents from the record. (I.C.C. Ex. 1; R. 53, 215-220.) Later, appellant introduced several other documents from the record. (I.C.C. Exs. 5, 6, and 7; R. 215, 230, 232, 273. Although the document appearing at page 273 is part of District Court Exhibit 2, it is identical with Interstate Commerce Commission Exhibit 6, which has not been printed.) Before the District Court, certain documents which were part of the record in the grandfather case but which had not been introduced into evidence before the Commission, except by reference, were introduced into evidence. (D.C. Ex. 2; R. 38, 247-273.) For the Court's convenience, all of the documents from the Commission's record in the grandfather proceeding which are contained in the printed record before this Court, regardless of when and by whom they were introduced, are as follows, arranged in proper sequence:

Application for grandfather permit, with attachments, dated December 30, 1935 (D.C. Ex. 2; R. 38, 247-262—note that because of a printing error pages 247 and 248 should be reversed);

Nelson's Schedule of Minimum Rates and Charges, issued March 30, 1936 (D.C. Ex. 2; R. 38, 273);

Sworn statement of Andrew G. Nelson, submitted in support of application, with attachments, dated November 11, 1936 (D.C. Ex. 2; R. 38, 263-272);

Commission's compliance order, dated February 14, 1938 (I.C.C. Ex. 5; R. 215, 230-231);

Grandfather permit, dated March 13, 1942 (I.C.C. Ex. 7; R. 215, 232).

Andrew G. Nelson started in the warehouse and trucking business in Chicago, under the name Nelson Warehouse and Express Company, in 1919 and incorporated the interstate phase of his trucking business under the name Andrew G. Nelson, Inc., in 1951.[6] (R. 73, 77, 160, 248.)

In preparation for the hearing, Nelson compiled, from his memory and from the cash book he had kept since he started in business,[7] a list of some of the customers for whom he was transporting merchandise during and preceding 1935, when the Motor Carrier Act was passed. (R. 77, 158.) For convenience, we have reduced his testimony regarding these customers to tabular form and have drawn a comparison between the commodities hauled by Nelson during the grandfather period (prior to July 1, 1935) and the commodities allegedly hauled by appellant in violation of its permit between July 31 and December 7, 1953. (Appendix A, *infra*, p. 48) Nelson's testimony shows that, between the time he started in business in 1919 and 1935, Nelson was in the business of hauling anything, anywhere, for anybody, for any price. (Appendix A; R. 84, 96-98.) He lost some of his customers during the eary 1930's when they went out of business because of the depression, but there is nothing to indicate that, as of 1935, he was not still in the business of hauling anything, anywhere, for anybody who wanted his services. (Appendix A; R. 75, 79, 80, 148-152.) In fact, on August 24, 1934, he was granted a Certificate of Registration under the Code of Fair Competition for the Trucking Industry (established by the National Recovery Act) in which he was described as an "ANYWHERE FOR HIRE Member of the Trucking Industry."[8] (I.C.C. Ex. 4; R. 215, 229.)

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[6] Subsequently, Nelson sold all of his stock in appellant, so that he had no financial or other interest in its operations at the time of the hearing, nor was he related to appellant's president, Harold E. Nelson. (R. 73.)

[7] Nelson's other books, delivery tickets, etc. had been given to the scrap drive during the war and were not available at the time of the hearing. (R. 77-78.)

When the Motor Carrier Act was passed in 1935, Nelson went to the local office of the Commission's Bureau of Motor Carriers to see what he had to do to comply with the new law. (R. 75.) His case was handled, for the most part, by a Mr. Petritz, who was deceased at the time of the hearing. (R. 85-86.) Nelson did not know how to go about procuring a permit and was not represented by counsel, so he relied on Petritz, who guided him in the process. (R. 85, 92.) Eventually, Nelson was given forms to fill out in order to obtain a permit and he was told by Petritz how to file the application. (R. 87.)

On January 2, 1936, Nelson submitted his application for a permit to transport "store fixtures, miscellaneous merchandise and household furniture" in interstate commerce as a contract carrier by motor vehicle. (D.C. Ex. 2: R. 38, 248.) Exhibit A to the application was a questionnaire concerning the type of service rendered by and the routes and territory served by the applicant as of July 1, 1935. (R. 247, 249.) Nelson's answers to the various questions give the impression that, as of July 1, 1935, he had only one contract—with the Walgreen Company—to transport store fixtures, miscellaneous merchandise, and household goods of employees in connection with the opening, closing and remodeling of Walgreen stores within a 600 mile radius of Chicago. (Answers to Questions IB and III B-D; R. 247, 249.) As evidence in support of his answers, Nelson submitted with his application copies of his State of Indiana Public Service Commission permit (R. 254-258), his State of Wisconsin Public Service Commission license (R. 258-261), and an affidavit by Walgreen's traffic manager (R. 261-262), all of which confirm the impression that Nelson was hauling only for Walgreen.

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[8] Under Section 209 (a) of part II of the Interstate Commerce Act, *supra*, p. 2, the fact of such registration "shall be evidence of bona fide operation to be considered in connection with the issuance of such [grandfather] permit."

Subsequent to the filing of the application, the Commission's inspectors investigated Nelson's operations—particularly his delivery tickets and bills of lading.[9] (R. 76-77.) Unfortunately, the report of their investigation is not a part of the record before this Court.[10]

On November 11, 1936, in the Bureau of Motor Carriers' Office, Petritz gave Nelson a statement to read and sign, in connection with his pending application. (R. 89-90, 153.) Like the application itself, the statement gives the impression that Nelson's only contract was to haul store fixtures, equipment and merchandise in connection with the opening, closing, or remodeling of Walgreen Drug Stores and to haul household goods for Walgreen's employees at Walgreen's expense. (D.C. Ex. 2; R. 38, 263-265.) This impression is confirmed by certain documents attached to the statement, consisting of affidavits of Nelson's warehouse foreman and two of his drivers (R. 265-269), a list of 17 of Nelson's delivery tickets showing shipments for Walgreen in ten states (Statement, par. 9 (6); R. 265, 269-270) and a copy of Nelson's contract with Walgreen. (R. 270-272).

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[9] The documents inspected were not available at the time of the hearing; they had been given to a scrap drive during the war. (R. 76-78.)

[10] As indicated above (note 5), the entire record in the grandfather proceeding was incorporated into evidence by reference at the hearing before the Commission. Then, at the hearing before the district court, appellant introduced into evidence what it believed to be the entire record in the grandfather proceeding prepared and certified by the Commission pursuant to an agreement that the entire record would be produced and placed in evidence. (D.C. Ex. 2; R. 38.) This exhibit contains no reference to a report of investigation. However, since this case was docketed in this Court, we have discovered that the Commission has a so-called "confidential" file with respect to Nelson's grandfather application, containing a report by Mr. Petritz, who made the investigation of Nelson's grandfather operations. Despite repeated requests, we have been denied the right to see that report and, therefore, do not know what light it might shed on the nature of Nelson's grandfather operations.

In contrast to the impression given by the application and statement in support thereof, Nelson testified that, about the middle of 1935, Walgreen was not his only interstate trucking account, but that he was hauling various commodities for other shippers, that less than one-half of his business involved the transportation of products to drug stores or drug warehouses, and that at the time of the application, he had delivery tickets to show it. (R. 93-94, 99-100, 133-134.) Nelson explained the apparent discrepancy between the documentary evidence and his testimony in the following manner:

Nelson had been serving Walgreen since 1919 and that was his "blue ribbon" account. (R. 92-93.) He was told by Petritz that, in order to get the kind of permit he wanted (i.e., a permit to haul store fixtures, household goods, and miscellaneous merchandise as a contract carrier) it was necessary to show only that he had *one* contract and that he had made *one* delivery in each state for which authority was requested; then, after he had received his permit, he could add other contracts with anybody so as to continue the kind of business he had been doing. (R. 90-91, 98, 153-154.) Accordingly, Nelson submitted his application and supporting statement showing only his Walgreen contract and only Walgreen delivery tickets because Petritz had advised him how to fill out the application and had actually prepared and told him to sign the supporting statement. (R. 87, 89-91, 133-134, 153.) Nelson signed because he knew nothing about the new law and was just trying "to get by the best I could". (R. 139-140.) Nelson even objected to paragraph 7 of the statement, to the effect that he was an interstate contract carrier only for Walgreen, but he signed the statement because he was told by Petritz that that was the way to get the kind of permit he had applied for. (R. 89-91, 133-134, 153-154.) Likewise, paragraph 10 of the statement, to the effect that "his operations, except for frequency of service, have been the same for the past seventeen years" was not true, insofar as it implied that he had been hauling only for Walgreen; but he signed it anyhow. (R. 138-139.)

No hearing was held in connection with Nelson's grandfather application.[11] (Examiner's report; R. 244.) However, on February 14, 1938, the Commission issued what is commonly known as a compliance order, which read, in part, as follows (I.C.C. Ex. 5; R. 215, 230):

> After due investigation:
>
> *It appearing*, that applicant in accordance with the requirements of Section 209, Motor Carrier Act, 1935, * * * made application for a permit to operate as a contract carrier by motor vehicle according to the specification *set forth as appended on the reverse side hereof or attached hereto* * * * and that the said applicant * * * was in bona fide operation in such manner on July 1, 1935, and has so operated since that time; and the Commission so finding: therefore
>
> *It is ordered*, that upon full compliance with the requirements of Sections 215 and 218 of the said Act * * * a permit shall be issued * * * authorizing said applicant to engage in interstate or foreign commerce, as a contract carrier by motor vehicle according to the specification *set forth as appended on the reverse side hereof or attached hereto*, and made a part of this order:

The appendix "on the reverse side" of the compliance order states (R. 231):

> The business of applicant * * * in interstate or foreign commerce as a contract carrier by motor vehicle

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[11] This was not unusual; many uncontested grandfather applications were handled informally. *Coastal Tank Lines, Inc.* v. *Charlton Bros. Transp. Co., Inc.*, 48 M.C.C. 289, 295 (note 3) (1948).

of the commodities indicated, over irregular routes, is as specified below:

New and used store fixtures, new and used household goods, and *stock* in trade of drug stores.

Between points and places in [10 Mid-western States].

It should be noted that, although the compliance order states that Nelson had applied for a permit "according to the specification" set forth in the appendix and that Nelson was in bona fide operation "in such manner" on and after July 1, 1935, the specification lists the commodities transported as "*New and used store fixtures, new and used household goods*, and *stock* in trade of drug stores", whereas Nelson's application was for a permit to transport "store fixtures, miscellaneous merchandise and household furniture." (D.C. Ex. 2; R. 38, 248.) In addition, the list of delivery tickets submitted with the application described the commodities hauled only by the following terms[12]. (D.C. Ex. 2; R. 38, 269-270):

Miscellaneous fixtures
Miscellaneous store fixtures
Miscellaneous fountain outfit
Miscellaneous equipment and stock
Miscellaneous merchandise
Miscellaneous household goods.

Nowhere in any of the documents before the Commission when the compliance order was issued was there any reference to the phrase "*stock* in trade of drug stores."

As noted above, the Commission finally issued Nelson's grandfather permit on March 13, 1942 (almost six years after the application was filed on January 2, 1936, and over

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[12] See also Nelson's Schedule of Minimum Rates or Charges, issued March 30, 1936, and submitted in connection with his application, in which he quoted rates for the following commodities (D.C. Ex. 2; R. 38, 273):

Store Fixtures
Miscellaneous Merchandise
Household Goods and Furniture

four years after the compliance order was issued on February 14, 1938). The permit orders (I.C.C. Ex. 7; R. 215, 232):

> *** That the transportation service to be performed by [Nelson] * * * shall be as specified below:
>
> *New and used store fixtures, new and used household goods,* and *stock* in trade of drug stores, over irregular routes,
>
> Between points and places in [10 Mid-western States].

This, then, was the background of events that led up to the issuance of the grandfather permit whose interpretation was before the Commission in *Andrew G. Nelson, Inc.—Investigation of Operations.*

On September 22, 1954, the hearing examiner issued his report (1) setting forth the pertinent language of the permit, (2) listing the commodities transported by appellant which were alleged to be in excess of the authority granted by the permit, (3) pointing out that these items do constitute part of the stock in trade of a drug store, but (4) interpreting the "commodity description '*stock* in trade of drug stores'" as the equivalent of "*drugstores'* stock in trade" and (5) concluding that, under that interpretation, appellant could transport either commodities to drug stores only or commodities "which are earmarked for eventual delivery to and sale in a drugstore." (D.C. Fdg. 14; R. 282; D.C. Ex. 1; R. 38, 240,243-244.) Accordingly, the examiner found that appellant had engaged in operations not within the scope of its operating authority, in violation of Section 209 (a) of part II of the Interstate Commerce Act, and recommended the issuance of a so-called cease and desist order. (R. 246.) It should be noted that, in reaching his decision, the examiner held that the permit contained no patent ambiguity, so that (R. 242, 244):

> In considering the issue thus presented neither the operations of respondent prior to the "grandfather"

> date, nor the Commission's intentions with respect thereto in issuing the permit, are of any importance.

Nevertheless, he did bolster his conclusion by "an examination of the circumstances under which the permit was issued," referring only to the documentary evidence which was before him concerning the grandfather application and completely ignoring Nelson's testimony explaining the circumstances under which the application had been made. (R. 244.) It should also be noted that the examiner in no way attempted to interpret the commodity descriptions "*New and used store fixtures*" or "*new and used household goods*" to determine whether or not some of the commodities allegedly hauled in violation of the terms of appellant's permit might have been authorized by those descriptions;[13] rather, he stated (R. 242):

> The sole issue herein is thus explicit and requires a determination of the extent of the authority granted by the commodity description "*stock* in trade of drug stores."

Appellant filed exceptions to the examiner's report on October 29, 1954. (D.C. Fdg. No. 15; R. 282.). On March 17, 1955, the Commission, by division 5, filed its report adopting the examiner's report as its own, except as modified,[14] stating that, with respect to that portion of the permit primarily in issue, namely, the phrase "*stock* in trade of drug stores", it agreed with the examiner that

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[13] At the beginning of the hearing, the Bureau's counsel had stated that some of the items might have been properly transported under the new and used store fixtures category. (R. 53.)

[14] So far as we can see, the Commission's report modifies or supplements the examiner's in only three respects:

(1) the term "*New and used store fixtures*" is defined, but only by reference to two of the Commission's decisions and not with respect to the commodities whose transportation was in question in this case (R. 237-238);

(2) appellant's contention that some or all of the questioned commodities could be hauled as "*new and used household goods*" is rejected on the theory that any article which is part of the stock in trade of a mercantile establishment does not come within the meaning of "household goods", except as incident to the movement of such establishment from one location to another (R. 238); and

(3) the Commission, unlike the examiner, holds that the important question to be decided is what transportation was intended to be authorized by the language of the permit (R. 238).

> *** to the exten[t] respondent is transporting commodities which at the time of their movement are not, or are not intended to become, part of the stock in trade of a drugstore, such operations are in excess of its authority ***,

and directing the entry of an order "requiring respondent to cease and desist from the operations found to be unauthorized." (D.C. Ex. 1; R. 38, 234, 240.) In reaching its conclusion the the Commission held that the language of the permit was not ambiguous and, therefore, gave no consideration to events underlying its issuance. (R. 237.)

On March 17, 1955, division 5 of the Commission issued an order requiring appellant, on or before May 2, 1955,[15] to cease and desist from the operations found in the Commission's report to be unauthorized and unlawful. (Compl. Ex. E; R. 31-32.)

On December 12, 1955, appellant filed this action in the United States District Court for the Northern District of Illinois (Eastern Division) to obtain an injunction against the enforcement of the Commission's cease and desist order. (R. 1.) On March 7, 1956, a hearing was held before a district court composed of Circuit Court of Appeals Judge Finnegan and District Court Judges LaBuy and Perry. (R. 37.)

The evidence consisted of the Commission's record in the proceeding under review (D.C. Ex. 1; R. 38, 46-246), the Commission's record in the grandfather proceeding. (D.C. Ex. 2; R. 38, 247-273[16]), appellant's permit (D.C. Ex. 3; R. 38, 274), and evidence to show that the Commission's cease and desist order would cause appellant irreparable injury (D.C. Ex. 4; R. 40, 42-43, 275).

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[15] The effective date of the cease and desist order was voluntarily postponed, from time to time, by the Commission, so that it was finally set for August 1, 1956. The Commission refused voluntarily to postpone the effective date beyond August 1st, but on July 28, 1956, Mr. Justice Reed signed an order staying the operation of the cease and desist order pending this appeal.

[16] As indicated above (note 5), pages 247 and 248 of the printed record should be reversed. The Certificate of the Secretary of the Commission covering Exhibit 2 in the District Court (Folio 466) was designated for printing, but was omitted in printing without any reference to its existence. Hence, there is no clear indication in the printed record of where Exhibit 1 ends (R. 246) and Exhibit 2 begins (R. 247).

On June 13, 1956, Judges Finnegan and LaBuy entered a memorandum opinion, findings of fact, and conclusions of law, outlining the history of the controversy, summarizing the Commission's conclusions, and refusing to disturb the Commission's order on the theory that it had acted within its statutory power and that its findings were supported by substantial evidence. (R. 276.) Judge Perry filed a dissenting memorandum opinion in which he considered the evidence showing the events underlying the issuance of the grandfather permit and concluded that the Commission had exceeded its statutory power in attempting to limit, by retroactive interpretation, the scope of the operations authorized by the permit and guarantied to appellant under the grandfather clause of the Interstate Commerce Act. (R. 284.)

SUMMARY OF ARGUMENT.

In a contract carrier by motor vehicle permit issued in 1942, under the grandfather clause (Section 209 (a)) of Part II of the Interstate Commerce Act, appellant's predecessor was authorized to transport "*stock* in trade of drug stores." In 1955, under the guise of interpretation, the Commission held that appellant was authorized to transport "*stock* in trade of drug stores" *only* when such items were already part of or were intended to become part of the stock in trade of a drug store. In arriving at this conclusion the Commission applied a pernicious interpretive device known as the intended use test—first enunciated in 1949.

Appellant contends that the phrase "*stock* in trade of drug stores", as used in its permit, is nothing more than a generic description of commodities authorized to be transported by reference to the places where they are sold. This technique of commodity description was well known when the grandfather permit was issued, and the Commission's own decisions, at the time, made it clear that such a description authorized the transportation of commodities within the described class regardless of consignor or consignee. In fact, because the scope of such commodity descriptions was so broad, the Commission developed the so-called *Keystone* restriction in order to restrict the class of shippers for which commodities of the described class could be transported and said that was the only type of restriction appropriate for such commodity description. The classic example of a generic commodity description limited by a *Keystone* restriction is: such merchandise as is dealt in by grocery stores for persons who operate grocery stores. However, no *Keystone* restriction appears in appellant's permit and, under the Commission's own decisions, none may be implied.

Somewhat similar to a description of commodities by reference to the places where they are sold, but to be carefully distinguished under the Commission's own decisions, is a description of commodities by reference to the kind of business in which they are used, e.g., contractors' supplies. Although the Commission had early developed the *Keystone* restriction to limit authorizations to haul commodities described by reference to places where they are sold, no comparable restriction was developed to limit authorizations to haul commodities described by reference to the kind of business in which they are used. As a result, the Commission was later embarrassed to find that there were outstanding many extremely broad commodity authorizations—far broader than the expanding concept of the Commission's regulatory function could tolerate. In order to pare down these broad commodity authorizations the Commission developed the so-called intended use test as a restrictive interpretive device. In 1949, the Commission construed a certificate which authorized the transportation of materials, supplies and equipment *incidental to and used in* petroleum industry operations to mean that such commodities could be transported only when earmarked for such use. Building upon this decision the Commission applied the same restriction to such generic commodity descriptions, by reference to place of use, as packing house supplies, building materials, contractors' equipment, etc. The Commission was successful in restricting the transportation of such commodities to situations where they were actually earmarked for such use largely, we believe, because the carriers involved were all trying to read their commodity authorizations too broadly by ignoring the description of supplies, materials, or equipment by reference to the kind of business in which they are used. In any event, the Commission accomplished by interpretation and implication what it had failed to accomplish by express limitation when the authorizations were originally granted, viz., the imposition of the correlative equivalent of a *Key-*

stone restriction on generic commodity descriptions by reference to use; the consignees for whom such generically described commodities could be hauled was effectively limited to the ultimate user or to a clear conduit to the ultimate user.

The intended use test has never before been applied to a generic commodity description by reference to place of *sale*; in fact, both the Commission and a district court have refused to so apply it. The Commission's attempt to apply it now to appellant's permit constitutes (1) a misapplication of an interpretive device designed for commodity descriptions by reference to place or business of *use*, not for commodity descriptions by reference to place or business of *sale* and (2) an attempt to restrict by implication, under the guise of interpretation, a generic commodity description. Such a two-fold modification of appellant's permit is prohibited by Section 212 (a) of part II of the Interstate Commerce Act.

Not only has the Commission attempted to restrict appellant's operating authority by interpretive subtleties unknown when its predecessor's permit was granted, but it has done so in utter disregard of appellant's rights under the grandfather clause (Section 209 (a)) of part II of the Interstate Commerce Act by refusing to consider uncontroverted evidence (even as an aid to interpretation) that the grandfather carrier's operations were at least as broad as appellant's permit (unmodified by the Commission's intended use test) provides.

In addition, the procedure adopted by the Commission in restricting appellant's permit by implication is arbitrary and grossly unfair: the result was a foregone conclusion and the Commission introduced only such evidence from its files as supported its position, withheld other evidence, and refused to consider appellant's contrary evidence. The proceeding and the resulting cease and desist order violate the requirements of the Administrative Procedure Act.

ARGUMENT.

INTRODUCTION.

The defendant in a proceeding is forced to accept battle on the lines drawn by the moving party. A basic contention here is that the Commission had no authority to attempt a construction of a grandfather permit, openly stating its refusal even to consider evidence establishing the scope of the business carried on during the grandfather period and openly stating its refusal to consider the Commission's own finding of fact, still unchanged and in full force and effect, establishing what the scope of that grandfather business was. We contend that, as a matter of law, the permit must reflect the scope of that grandfather business, and that the Commission did not have then and does not have now, by any device or theory, the power to limit the carrier's authority in any way that restricts his operations to a scope narrower than that of the business carried on during the grandfather period.

But since the Commission has seen ~~fit to~~ cast this question to the background, and seeks to justify its action, regardless of the statutory requirements, by asserting its power to apply the so-called doctrine of intended use, we deem it advisable to meet the Commission first on the line of controversy selected by it. Therefore, we shall proceed first to a discussion of the ground upon which the Commission based its decision.

I.

APPLICATION OF THE INTENDED USE TEST IN CONSTRUING THE COMMODITY DESCRIPTION "STOCK IN TRADE OF DRUG STORES" CONSTITUTES AN ATTEMPT BY THE COMMISSION TO AMEND APPELLANT'S GRANDFATHER PERMIT, IN VIOLATION OF SECTION 212 (a) OF PART II OF THE INTERSTATE COMMERCE ACT.

A. The Commission Has No Right to Restrict the Operating Authority Granted in a Grandfather Permit by Interpreting it in the Light of a Subsequently Developed Canon of Construction.

On March 13, 1942, the Commission issued to appellant's predecessor, Andrew G. Nelson, a motor contract carrier permit to transport, *inter alia,*[17] "*stock* in trade of drug stores." (I.C.C. Ex. 7; R. 215, 232-233.)

On March 17, 1955, the Commission effectively restricted the consignees which might be served by holding that the permit authorized the transportation only of such stock in trade of drug stores as is, at the time of movement, a part of (or intended to become part of) the stock in trade of a drug store. (D.C. Ex. 1; R. 38, 234, 240.) This was done even though it was not contested that appellant had been hauling only commodities which constitute part of a drug store's stock in trade. (Examiner's Report; R. 241-242.)

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[17] Nelson's permit authorized transportation of "*New and used store fixtures, new and used household goods,* and *stock* in trade of drug stores." (R. 232.) The investigation of appellant's operations was predicated upon the proposition that appellant had been hauling specified commodities not within the scope of its permit. (D.C. Ex. 1; R. 38, 46-47.) The Bureau's whole attack was directed to the commodity authorization "*stock* in trade of drug stores" and the Commission's decision is similarly limited. However, under Section 7 (c) of the Administrative Procedure Act (5 U.S.C. 1952 ed., Sec. 1006), the proponent of an order has the burden of proof, and counsel for the Bureau of Motor Carriers admitted before the hearing examiner that some of the commodities named in the Commission's order initiating the investigation could be hauled under the commodity description "*New and used store fixtures.*" (R. 53.) Therefore, while appellant's argument will be devoted primarily to attacking the Commission's interpretation of "*stock* in trade of drug stores", appellant also contends that the Commission's cease and desist order is unlawful for lack of findings, supported by proof, that none of the commodities found to have been hauled in violation of the permit could be hauled under the commodity descriptions "*New and used store fixtures*" or "*new and used household goods.*"

It seems obvious that an authorization to haul stock in trade of drug stores is not the same as an authorization to haul stock in trade of drug stores which at the time of movement is or is intended to become part of the stock in trade of a particular drug store. The additional restriction is arrived at through the application of the so-called intended use test. (D.C. Ex. 1; R. 38, 234, 240.)

The Commission has made the following self-serving statement (*C & H Transp. Co. Inc., Interpretation of Certificate*, 62 M.C.C. 586, 587 (1954)):

> In the issuance of motor-carrier operating authorities this Commission from the beginning of motor-carrier regulation has identified the commodities authorized to be transported in three principal ways: (a) by naming them specifically (a practice which is impractical in many instances), (b) by the use of generic or class terms, and (c) *by reference to the intended future use*. (Italics supplied.)

However, it is clear that, in the early days of motor carrier regulation, the Commission's commodity description technique was not so defined.

In *Classification of Motor Carriers of Property*, 2 M.C.C. 703, 706 (1937), the Commission established and defined 17 different groups of commodities and analysis shows that they are defined only (1) by naming them specifically, (2) by the use of generic or class terms, and (3) by the type of equipment to be operated. The first and second classification are as stated by the Commission in the *C. & H. Transp. Co.* Case, but nowhere is there any reference to the technique of describing commodities by reference to their intended future use. Cf. *Keystone Transp. Co. Contract Carrier Application*, 19 M.C.C. 475, 484 (1939).

Originally, the Commission was not as careful as it should have been in developing refined techniques to describe accurately the scope of operations being authorized. However, in *Keystone Transp. Co. Contract Carrier Application*, 19 M.C.C. 475 (1939), the Commission authorized the transportation of such merchandise as is dealt in by grocery stores but added a special restriction that such commodities could be transported only for persons who operate grocery stores. This was a milestone in the development of the Commission's technique in delimiting the scope of authorized operations.[18] Still, however, there is no reference to intended use as a commodity desciption technique.

In *England Transp. Co., Inc., Extension—Mississippi Points*, 49 M.C.C. 567 (1949), the Commission construed a certificate which authorized the transportation of:

> * * * machinery, material, supplies, and equipment *incidental to and used in* the construction, development, operation, and maintenance of facilities for the discovery, development, and production of natural gas and petroleum * * *. (Italics supplied.)

The carrier claimed that he could haul composition pipe to be used in constructing *water* pipe lines, but the Commission held that the authorized commodities (machinery, materials, supplies, and equipment) had been described by reference to their use and that they could be transported only when intended for use in the gas and petroleum industry. So far as we are aware, this is the first case in which the Commission applied what later became known as the intended use test in interpreting a permit.

It should be observed that the permit in the *England* case actually contained the language "incidental to and used in"—a special limitation on the use to which the machinery, materials, supplies, and equipment being transported could be put. However, once the theory was announced in the *England* case, the Commission imposed such special limitations not only on permits in which it was explicit,[19] but also in cases where commodities had simply been defined, generically, by reference to the kind of business in which they are customarily used,[20] and even to a clear case of generic commodity description.[21] The pattern is a familiar one: an agency discovers a useful regulatory device and, before long, it is being applied out of context to situations never contemplated in the beginning.

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[18] Use of a so-called *Keystone* restriction where necessary to describe accurately the scope of authorized operations was approved by this Court in *Noble* v. *United States*, 318 U.S. 88 (1943).

The cases in note 20 all involved attempts by carriers to construe such broad terms as materials, supplies, and equipment without reference to the descriptive limitations placed on those terms in their permits. The Commission rightly concluded that to ignore the descriptive limitations would be to grant general commodity authorization, which was obviously not intended. So the Commission seized upon the occasion to imply a special kind of limitation in the commodity description. Instead of simply restricting transportation to such supplies, materials, or equipment as are used by packing houses, contractors, etc., the Commission went further, under the guise of interpretation, and held that such supplies as are used by contractors, for example, may be transported only when definitely intended for use by a contractor. In doing so the Commission superimposed upon generic commodity descriptions special limitations upon the circumstances in which commodities falling within those generic classifications could be transported. Perhaps the Commission's success in superimposing the intended use test on such generic commodity descriptions can be attributed to the fact that the carriers involved were obviously trying to expand their authoziations beyond reasonable limits. In any event, the Commission did succeed in restricting commodity authorizations by using the intended use test as an interpretive device.

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[19] *Greenberg—Investigation of Operations*, 52 M.C.C. 25 (1950), 387 (1951) ("Commodities used or useful in the manufacture of beds and brooms"); *P. B. Mutrie Motor Transp., Inc.* v. *Blue Line Exp., Inc.*, 53 M.C.C. 530 (1951) ("supplies and equipment used in the manufacture of [textile-mill] products").

[20] *Dart Transit Co.—Modification of Permit*, 49 M.C.C. 607 (1949) ("packing house and dairy * * * equipment, materials, and supplies"); *Builders Exp., Inc., Interpretation of Certificate*, 51 M.C.C. 103 (1949) ("contractors' materials, supplies, and equipment"); *Crouch—Modification of Certificate*, 53 M.C.C. 436 (1951) ("farm supplies"); *Fleetlines, Inc.*, v. *Osbourn Trucking Co.*, 54 M.C.C. 221 (1952) ("building and construction materials, equipment, and supplies, and mining equipment and supplies"); *Dunn Extension—Radio Sets*, 54 M.C.C. 233 (1952) ("doctor's, dentist's, and hospital supplies and equipment"); *Dart Transit Co.—Investigation of Operations*, 54 M.C.C. 429 (1952), affirmed 110 F. Supp. 876 (Minn. 1953), motion to affirm granted, 345 U.S. 980 (1953) ("canning factory supplies"); *Pierce Auto Freight Lines, Inc.*, v. *Converse*, 54 M.C.C. 447 (1952) ("mining and construction materials, equipment and supplies"), affirmed, 109 F. Supp. 807, 809 (N.D. Calif. 1953), with the qualification that the court was not willing to approve the intended use test in all circumstances; *Johnson Truck Service* v. *Salvino*, 61 M.C.C. 329 (1952) ("factory supplies"), reversed on other grounds, 119 F. Supp. 277 (W.D. Wash. 1954); *Point Pleasant Transp. Co., Inc., Declaratory Order*, 61 M.C.C. 666 (1953) ("building materials"); *C & H Transp. Co., Inc., Interpretation of Certificate*, 62 M.C.C. 586 (1954) ("contractors' equipment and supplies"); *Mural Trucking Service Interpretation of Certificate*, 63 M.C.C. 47 (1954) ("store fixtures and store equipment"; "hotel equipment").

[21] *Carroll Trucking Co. Interpretation of Certificate*, 54 M.C.C. 664 (1952) ("structural steel"), reversed on reconsideration, *Carroll Trucking Co. Interpretation of Certificate*, 62 M.C.C. 348 (1953).

A distinction must be made between intended use as a commodity description technique and intended use as a restrictive interpretive device. We agree that the Commission has no doubt described commodities from the beginning by reference to the persons by whom or the places or businesses where they are used; but only since the *England* case in 1949 has the Commission developed the theory that, inherent in what are plainly generic commodity descriptions, is the limitation that such commodities as are used in the particular business specified can be transported only when earmarked for such use.

We believe that the intended use test, when applied as a restrictive interpretive device to permits issued before it was invented in 1949, is nothing more than a subterfuge to enable the Commission to pare down operating rights which it deems too broad under its current policies. Once a permit has been granted it can be modified only as provided in Section 212 (a) of part II of the Interstate Commerce Act, *supra*, p. 3—and then only for one of the reasons specified in the statute. *United States v. Seatrain Lines*, 329 U.S. 424, 430-431 (1947); *Campbell Sixty-Six Exp., Inc. v. Frisco Transp. Co.*, 46 M.C.C. 222 (1946); *Coastal Tank Lines, Inc. v. Charlton Bros. Transp. Co., Inc.*, 48 M.C.C. 289 (1948). To avoid this statutory limitation on its power, the Commission frequently tries to accomplish its desires under the guise of interpretation.[22] For example, in *Bird Trucking Co.—Modification of Certificate*, 53 M.C.C. 703 (1952), the Commission interpreted the commodity description "groceries" in a grandfather certificate to mean only edibles. However, in *Bird Trucking Co. v. United States*, 11 Federal Carriers Cases, par. 81,028 (W.D. Wis. Sept. 26, 1955), the district court found that the term had not been so restrictively construed when the permit was issued and remanded the case to the Commission. Similarly, in *Johnson Truck Service v. Salvino*, 61 M.C.C. 329 (1952), the Commission interpreted "factory supplies" in a grandfather permit to mean only commodities used in operating a factory, as distinguished from raw materials which go into the product manufactured. However, the district court found that "supplies", as it was understood when the permit was issued, embraced "materials" and that the distinction had not been made by the Commission until years afterward. *Salvino v. United States*, 119 F. Supp. 277 (W.D. Wash. 1954). On remand, the Commission agreed that the two terms had not been distinguished when the permit was issued and authorized the issuance of a revised permit covering both commodities. *Johnson Truck Service v. Salvino*, 63 M.C.C. 1 (1954).

In the *Bird* and *Salvino* cases, the Commission was unsuccessful in its attempts to restrict the scope of the carriers' operating authority under the guise of interpretation.[23] Thus far, it has been successful in the intended use cases; however, we believe it is time for a reappraisal of the Commission's practices in such cases. Where, as in appellant's case, the permit was issued before the intended use test was developed as a restrictive interpretive device, the Commission should not be able to avoid the mandate of Section 212 (a) and cut down the operating authority on the basis of subsequently-adopted subtleties of definition.

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[22] On rare occasions the Commission has stated that no restriction can be implied in a permit in which it is not explicit. *Atlantic Frt. Lines, Inc.—Petition for Declaratory Order*, 51 M.C.C. 175, 188 (1949); *Vilas Contract Carrier Application*, 62 M.C.C. 106, 107 (1953).

B. In any Event, the Intended-Use Test, as a Restrictive Interpretive Device, Cannot Properly be Applied in Interpreting a Permit Where Commodities are Described not by Reference to Their Intended Use but by Reference to the Places Where They Are Sold.

Appellant believes that the Commission has confused two well established commodity description techniques and has erroneously applied the intended use test to a description of authorized commodities not by reference to their use, but by reference to places where they are sold.[24] This distinction has been made by the Commission itself. In *C & H Transp. Co., Inc., Interpretation of Certificate*, 62 M.C.C. 586, 588 (1954), the Commission gave the following examples of the kinds of commodity descriptions to which the intended use test would be applied:

(1) "Commodities used in * * *".

(2) "contractors' equipment or supplies".

And in *Dart Transit Co.—Modification of Permit*, 49 M.C.C. 607, 612 (1949), the Commission said:

> * * * it may be observed that a grant of motor-carrier authority which identifies the authorized commodity

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[23] It is interesting to note that, in each case, the carrier, like appellant, claimed—and proved—that the restriction prosposed would violate his grandfather rights.

[24] Description of commodities by reference to places where they are sold is a well recognized technique. See *National Trucking Co., Inc., Ext.—Electrical Appliances*, 51 M.C.C. 638, 640 (1950); *Bird Trucking Co.—Modification of Certificate*, 53 M.C.C. 703, 706 (1952).

> by reference to the intended use is generally undesirable and is resorted to only where no other form of description is practicable. Such a grant is similar in some respects but should not be confused with grants which identify the authorized commodities by reference to the places where they are dealt in as, for example, "such merchandise as is dealt in by wholesale grocery houses." Grants in this form are ordinarily made only to contract carriers and are coupled with a so-called Keystone restriction as to the type of shipper for which service may be rendered.

As shown above, the intended use test was first applied to a certificate in which commodities were explicitly described by reference to their use. Subsequently the test has been applied to such apparently generic descriptions as building materials, construction supplies, mining equipment, etc. But in each case there was a semblance of logic in the application of the intended use test because the commodities had been described by reference to the business in which they are *used;* never before has the intended use test been applied to a description of commodities by reference to places where they are *sold*, e.g. such merchandise as is dealt in by grocery stores or, as in this case, stock in trade of drug stores.

In fact, the Commission has expressly refused to imply a restriction based on ultimate destination in a certificate authorizing the transportation of "such general merchandise as is dealt in by wholesale and retail grocery stores" (*Sanders Extension of Operations—Washington, D.C.*, 47 M.C.C. 210, 211 (1947)), and a certificate authorizing the transportation of "such commodities as are sold by retail mail-order houses" (*Vidas Contract Carrier Application*, 62 M.C.C. 106, 107 (1953)). In each case the Commission held that the quoted phrase was nothing more than a commodity description and that the commodities described could be transported for any shipper or consignee, regardless of his business. Similarly, in *Interstate Commerce*

Commission v. *Ratner*, 6 Federal Carriers Cases, par. 80,415 (N.D. Ill., April 15, 1947), the court refused to grant the Commission's request for an injunction against the transportation of beer and empty beer containers from a brewery to a distributor where the commodities authorized in the permit were "*such merchandise* as is dealt in by wholesale food business houses, and * * * *equipment, materials* and *supplies* used in the conduct of such business", because it found that wholesale food business houses dealt in beer.

It is important to note that in the *Sanders, Vidas* and *Ratner* cases the commodities authorized to be transported were defined not by reference to their intended use, but by reference to the places where they were sold.

Once this distinction is made clear, the only question with respect to the construction of appellant's permit is whether or not the phrase "*stock* in trade of drug stores" is a commodity description by reference to intended use or merely a description of commodities by reference to the places where they are sold. As "stock in trade" is clearly merchandise sold by, and not used by, drug stores, the intended use test has no application to appellant's permit. If there is any distinction between the commodity description "such merchandise as is dealt in by", as in the *Sanders, Vidas* and *Ratner* cases, and "*stock* in trade of", as in appellant's permit, it is a distinction without a difference and this is clearly illustrated in *McAteer Contract Carrier Application*, 42 M.C.C. 35 (1943). McAteer was one of 189 contract carriers who hauled exclusively for the A&P Company. All of these contract carriers had applied for contract carrier permits when the Motor Carrier Act, 1935, went into effect. On February 14, 1938, the Commission issued to McAteer a compliance order directing that on complying with certain formalities it should be issued a permit authorizing the transportation of (p. 46):

> * * * such merchandise as is dealt in by wholesale, retail and chain grocer[I]y houses, and in connection

therewith equipment, materials and supplies, used in the conduct of such business.

Subsequently, but before McAteer's permit was issued, certain railroads objected to this form of compliance order, which had also been issued to many other A&P contract carriers, on the ground that those contract carriers should be restricted to hauling the commodities described in the compliance orders only for persons who operate retail stores whose chief business is the sale of food. The Commission agreed and held that the now famous *Keystone* restriction should be imposed in granting operating permits to the A&P contract carriers. *Keystone Transp. Co. Contract Carrier Application*, 19 M.C.C. 475 (1939). The A&P carriers decided to request a rehearing before taking the issue to the courts for review, but decided that the McAteer application provided a better test case because it gave a better indication of the scope of A&P operations. Accordingly, proceedings in the *Keystone* case were suspended and McAteer requested a formal hearing if the Commission had in mind amending its 1938 compliance order to include a *Keystone* restriction. A hearing was granted on McAteer's application, but the Commission adhered to its position in the *Keystone* case and ordered the issuance of a permit which, in essence, authorized the transportation of such merchandise as is dealt in by grocery stores only for persons who operate grocery stores.

The *McAteer* case is particularly significant because the Commission found that McAteer had been transporting (1) "the *stock in trade* of A&P stores" and (2) miscellaneous store and plant supplies and equipment. 42 M.C.C. 35, 45-46 (Italics supplied). The Commission held that a permit authorizing the transportation of "such merchandise as is dealt in by * * * grocery and food business houses, and, in connection therewith, equipment, materials, and supplies used in the conduct of such business" permitted the transportation of any commodities which McAteer had transported in the past and every commodity of like class which might be offered him. *Id.*, at 46-47. Clearly, the Commission was equating "stock in trade of" with "such merchandise as is dealt in by".[25]

It is also significant that in the *Keystone* case itself, the Commission justified the imposition of the *Keystone* restriction on the theory that there was no other way accurately and closely to define the business of the A&P contract carriers except by reference to the class of shippers served and that the only alternative to the imposition of a Keystone restriction was simply to authorize the transportation of such merchandise as is dealt in by wholesale, retail and chain groceries, which would be tantamount to general commodity authorization. 19 M.C.C. 475, 494 (1939). Chairman Eastman put it this way in his concurring opinion (p. 500):

> Under such a permit the holder could lawfully enter into a contract or contracts with any person for the transportation of the commodity, commodities, or class of commodities specifically named in the permit or embraced in the general commodity description thereof. To make the situation still plainer, if a contract carrier were authorized to transport such merchandise as is dealt in by a large mercantile concern or by a wholesale or a retail chain grocery business, it could enter into a contract or contracts with any shipper or concern to transport any one or all of the commodities coming within such commodity description and moving within the territorial limitations of its permit.
>
> When it is considered how extensive the list of commodities is which comes "within such commodity description," it becomes evident that such a permit would for practical purposes be equivalent to a grant of authority to transport as a contract carrier commodities in general within the specified territory.

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[25] It is significant that the Commission which decided the *McAteer* case was composed of the same personnel as that which granted Nelson's permit.

The *Keystone* and *McAteer* cases make it clear that, where commodities are described by reference to the places where they are sold, the only appropriate limitation is a *Keystone* restriction. See also *Dart Transit Co.—Modification of Permit*, 49 M.C.C. 607, 612 (1949).

It may be that the Commission now feels that it erred in issuing to Nelson a permit which authorized the transportation of "*stock* in trade of drug stores" without a *Keystone* restriction.[26] However, it is well established that no such restriction can be implied in a permit in which it is not explicit.[27] *Vidas Contract Carrier Application*, 62 M.C.C. 106, 107 (1953). Cf *Chrispens Truck Lines, Inc.—Investigation of Operations*, 63 M.C.C. 625 (1955).

["S]*tock* in trade of drug stores," is equivalent to "such merchandise as is dealt in by drug stores" and is nothing more than a description of commodities authorized by reference to places where they are sold. This was, in effect, conceded by the hearing examiner. (R. 243.) In addition, in the 1938 compliance order, which was part of the evidence underlying the issuance of the grandfather permit which the Commission refused to consider (R. 237), the Commission found that Nelson had been transporting "commodities indicated" as, *inter alia*, "*stock* in trade of drug stores" (I.C.C. Ex. 5; R. 215, 230). The examiner conceded that the issue before him would have been entirely different if the permit had read "commodities described as stock in trade of drug stores." (R. 242-243.) We fail to see any difference between "commodities indicated," as in the compliance order and "commodities described as," as in the examiner's report.

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[26] It should be noted that the commodity description "*stock* in trade of drug stores" in Nelson's 1942 permit was taken directly from the Commission's compliance order, issued February 14, 1938, the same date on which McAteer's compliance order authorizing the transportation of "such merchandise as is dealt in by wholesale, retail, and chain grocer[l]y food business houses." was issued. As indicated above, the Commission found it necessary, after adoption of the *Keystone* restriction in 1939, to amend McAteer's compliance order in order to add a *Keystone* restriction. It may be that, had the Commission thought about it, it would likewise have tried to add a *Keystone* restriction to Nelson's commodity authorization. However, as we will demonstrate in Point II of the argument, the imposition of a *Keystone* restriction on Nelson's operating authority would have been unwarranted in view of the nature of his grandfather operations and of his rights under the grandfather clause.

[27] A *Keystone* restriction limits the class of shippers which may be served. The restriction imposed by application of the intended use test is correlative in that it limits, for all practical purposes, the consignees which may be served to users of the commodities in the manner specified or conduits to such users. If a *Keystone* restriction can not be implied in a permit, neither can an intended use restriction.

Under the Commission's own decisions, a commodity description by reference to place of sale must be distinguished from a description of commodities by reference to their use. Clearly, the Commission has misapplied the intended use test to the commodity description "*stock* in trade of drug stores." The Commission has attempted (1) to change the nature of the commodity description in appellant's permit from a description of commodities authorized by reference to places where they are sold to a description by reference to places where they are used and (2) to require that the commodities so described be earmarked for such use at the time of transportation by applying a restrictive interpretive device (the intended use test) developed after the permit was issued. Such a twofold modification of appellant's permit cannot be made, under the guise of interpretation, to implement the Commission's current policies, in violation of Section 212 (a)[28] of part II of the Interstate Commerce Act, *supra*, p. 3.

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[28] The Commission, early in its administration of the Motor Carrier Act, 1935, developed hostility toward contract carriers—particularly those with grandfather rights. See, for example, the concurring opinion of Chairman Eastman and the dissenting opinion of Commissioner Lee in *Keystone Transp. Co. Contract Carrier Application*, 19 M.C.C. 475, 496, 500 (1939). Contract carriers possessed greater flexibility of operations than common carriers, whom the Commission felt obligated to protect; and the operations of carriers with grandfather rights could not be moulded to suit the Commission's concept of its regulatory function. As a result, the Commission, over the years, launched a subtle, but effective, attack on carriers with grandfather rights which has been skillfully described by District Judge (now Court of Appeals Judge) Fee in his concurring opinion in *Johnson* v. *United States*, 41 F. Supp. 188, 190 (Oregon 1941). Among other things, Judge Fee deplores (p. 190):

> * * * the patent injustice of using a test which at the time of the event had not been called to the attention of the carrier by express terms of the statute nor foreshadowed by the decisions of the Commission itself * * *.

United States v. *Seatrain Lines*, 329 U.S. 424 (1947); *Bird Trucking Co.* v. *United States*, 11 Federal Carriers Cases, par. 81,028 (W.D. Wis. Sept. 26, 1955); *Salvino* v. *United States*, 119 F. Supp. 277 (W.D. Wash. 1954); *Campbell Sixty-Six Exp., Inc.* v. *Frisco Transp. Co.*, 46 M.C.C. 222 (1946); *Coastal Tank Lines, Inc.* v. *Charlton Bros. Transp. Co., Inc.*, 48 M.C.C. 289 (1948).

II.

THE COMMISSION ERRED IN REFUSING TO CONSIDER EVIDENCE OF NELSON'S GRANDFATHER OPERATIONS.

A. If the commodity description "stock in trade of drug stores" in appellant's permit is ambiguous, the Commission should have considered evidence of Nelson's grandfather operations as an aid to interpreting what was intended by that language.

We agree with the Commission that the ultimate question in this case is what transportation was intended to be authorized by the language "*stock* in trade of drug stores" (together with the other commodity descriptions) in appellant's permit. (R. 238.) Congress intended, in Section 209 (a) of the Interstate Commerce Act, Part II, *supra*, p. 2, to guaranty to grandfather carriers substantial parity between the transportation conducted prior to motor carrier regulation and the transportation authorized in certificates and permits issued to them by the Commission under the Motor Carrier Act, 1935. *Alton R. Co.* v. *United States*, 315 U.S. 15 (1942). Because of this statutory mandate, the Commission has frequently found it helpful to examine underlying grandfather operations in interpreting what was intended by the language of a grandfather permit. *Balt. & A. R. Co.* v. *Red Star Motor Coaches, Inc.*, 44 M.C.C. 243, 245 (1944). However, the Commission has developed a rule that underlying grandfather operations will be examined only where the language of the permit to be interpreted is ambiguous.[29] See, e.g., *Coastal Tank Lines, Inc.* v. *Charlton Bros. Transp. Co. Inc.*, 48 M.C.C. 289, 299-301 (1948); *P. Saldutti & Son, Inc., Interpretation of Permit*, 63 M.C.C. 593, 594 (1955). In this case, the Commission held that the phrase "*stock* in trade of drug stores" in appellant's permit was not ambiguous and, therefore, refused to consider evidence of Nelson's grandfather operations. (R. 237.)

Appellant has consistently maintained that the phrase "*stock* in trade of drug stores" in its permit is not ambiguous; nevertheless, appellant was forced to introduce evidence concerning Nelson's grandfather operations because of the position initially taken by the Bureau of Motor Carriers that the permit was ambiguous and that evidence of Nelson's grandfather operations proved that appellant was conducting unauthorized operations.[30] (R. 50-52, 114-116.)

If there is any ambiguity in appellant's commodity authorization, it is created solely because of the Commission's insistence that the phrase "*stock* in trade of drug stores" must be interpreted as embodying, by implication, the intended use test. In *Johnson Truck Service* v. *Salvino*, 61 M.C.C. 329 (1952), the Commission refused to consider evidence of underlying grandfather operations and insisted upon interpreting the carrier's permit according to refinements in commodity description unknown at the time the permit was issued. This grossly unfair approach was denounced in *Salvino* v. *United States*, 119 F. Supp. 277 (W. D. Wash. 1954), and the case was remanded to the Commission. On remand, the Commission reexamined the carrier's grandfather operations and found that the language in the grandfather permit was intended to authorize operations broader than the Commission's subsequent interpretation would have permitted. Similarly, in *Bird Trucking Co.—Modification of Certificate*, 53 M.C.C. 703 (1952), the Commission refused to give adequate consideration to the underlying grandfather operations and interpreted the commodity authorization in the light of a subsequent refinement in its descriptive technique. The case was remanded to the Commission for consideration of the evidence of the underlying grandfather operations. *Bird Trucking Co.* v. *United States*, 11 Federal Carriers Cases, par 81, 028 (W.D. Wis. Sept. 26, 1955).

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[29] The decision as to whether or not there is an ambiguity seems to depend on whether the grandfather evidence supports the Commission's position. In the following cases the Commission supported its decisions by showing that the commodities whose transportation the carrier claimed was authorized had not been transported during the grandfather period: *Builders Exp., Inc., Interpretation of Certificate*, 51 M.C.C. 103 (1949); *Black v. Interstate Commerce Commission*, 165 F. 2d 825 (C.A. 5 1948); *Dart Transit Co.—Modification of Permit*, 49 M.C.C. 607 (1949); *Dart Transit Co.—Investigation of Operations*, 54 M.C.C. 429 (1952); *Pomprowitz Extension—Packing House Products*, 51 M.C.C. 343 (1950); *Eclipse Motor Lines, Inc., Interpretation of Certificate*, 52 M.C.C. 391 (1951).

[30] Fortunately, appellant was able to produce Andrew G. Nelson, the grandfather carrier, to testify as to the nature of his operations. Obviously, it places a great burden on holders of grandfather permits to have to produce evidence of events taking place more than 20 years ago in order to combat the Commission's persistent efforts to nibble away at their operating rights under the guise of interpretation.

Since the position of the Bureau of Motor Carriers that the intended use test should be read into the commodity description "*stock* in trade of drug stores" created an ambiguity, the Commission should have examined Nelson's grandfather operations in order to resolve that ambiguity. Indeed, the Commission itself has stated, in *Bison Freight Lines* v. *Northwest Dispatch Inc.*, 60 M.C.C. 505, 506 (1954):

> Our attention has not been directed to any proceeding in which the Commission has refused to make an examination of antecedent matters and has held that an operation complained of was not authorized, where it was contended that such examination, if made, would disclose the intent of the framers of the certificate to authorize the operation.

Andrew G. Nelson's testimony clearly shows that, during the grandfather period, he was in the business of hauling anything, anywhere, for anybody, for any price, and that the nature of the commodities transported was even broader in scope than the commodities allegedly hauled in violation of the terms of appellant's permit. (Appendix A, *infra*, p. 48; R. 84, 96-98.)

The Commission's practice of considering grandfather evidence only where it supports its interpretation is nowhere better illustrated than in this case. At first, the Bureau of Motor Carriers maintained that appellant's permit was ambiguous—obviously because it was armed with documentary evidence from the record in the grandfather proceedings which indicated that Nelson had transported merchandise only for Walgreen Drug Stores. (I.C.C. Ex. 1; R. 53, 215-226.) This, of course, would have tended to support its position that stock in trade of drug stores was authorized to be transported only when intended to become part of the stock in trade of a drug store. However, after the hearing, during which appellant had introduced evidence that Nelson was hauling a variety of commodities not only for Walgreen, but also for manufacturers, jobbers, etc. (Appendix A, *infra*, p. 48), the Bureau switched its position and maintained that the permit was unambiguous in an effort to preclude consideration of the evidence underlying the issuance of the grandfather permit, and the Commission adopted the Bureau's position (R. 237, 242).

While appellant believes that its permit is not ambiguous, the contention of the Bureau of Motor Carriers that it should be interpreted as embodying a special limitation which had never been used in connection with a description of authorized commodities by reference to places where they are dealt in or sold, has made it ambiguous. Accordingly, the Commission should have considered evidence of Nelson's grandfather operations in determining whether or not the Bureau's contention was valid.

B. If the commodity description "stock in trade of drug stores" in appellant's permit is not ambiguous and if the Commission properly interpreted that description by applying the intended use test, the Commission should have altered the permit to accord the substantial parity between Nelson's grandfather operations and the authorized operations that is guarantied by the grandfather clause of the Interstate Commerce Act, Part II.

It is clear that a permit issued under the grandfather clause (Section 209 (a)) of part II of the Interstate Commerce Act, *supra*, p. 2, must authorize operations at least as broad as the underlying grandfather operations. *Alton R. Co. v. United States*, 315 U.S. 15 (1942). It is also clear that, where a permit does not conform to this requirement, the Commission may reopen the grandfather proceeding in which it was granted and may—indeed must—alter or modify the permit accordingly. *Grifall Common Carrier Application*, 62 M.C.C. 763 (1954); *Johnson Truck Service v. Salvino*, 63 M.C.C. 1 (1954).

Therefore, appellant contends that, if the commodity description "*stock* in trade of drug stores" is not ambiguous and if the intended use test has been properly applied in construing that commodity description, the language of the permit fails to grant substantial parity between the authorized operations and Nelson's grandfather operations and the Commission should have altered the permit accordingly. The nature of Nelson's grandfather operations, which the permit should have reflected, was as follows:

Andrew G. Nelson started his trucking business in 1919. (R. 77.) From that time until the middle of 1935, he was in the business of hauling anything, anywhere, for anybody, for any price.[31] (Appendix A, infra, p. 48; R. 84, 96-98.)

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[31] On August 24, 1934 Nelson was granted a Certificate of Registration under the code of fair competition for the trucking industry in which he was described as an "*ANYWHERE FOR HIRE Member of the Trucking Industry*". (I.C.C. Ex. 4; R. 215, 229.) Such registration in and of itself is evidence of *bona fide* operation to be considered in connection with the issuance of a grandfather permit. Interstate Commerce Act, Part II, Sec. 209 (a), *supra*, p. 2.

To be sure, many of his earlier customers went out of business during the depression, but that did not change the character of his holding out or of his actual operations. (Appendix A; R. 75, 79, 80, 148-152.) And it is well established that in determining the scope of a carrier's grandfather rights the important criterion is not the precise operations in which he was engaged on the grandfather date (July 1, 1935), but the general nature of his holding out, accompanied by operations consistent therewith. *Charles Burnett Trucking Co., Inc., Com. Car. Application*, 34 M.C.C. 467 (1942); *Johnson Truck Service v. Salviño*, 63 M.C.C. 1, 5 (1954). In *United States v. Carolina Carriers Corp.*, 315 U.S. 475 (1942), the Commission had attempted to issue a grandfather certificate limiting the carrier to the transportation of the specific commodities actually transported during the grandfather period. However, this Court held that, if the carrier had transported a wide variety of general commodities, the Commission had no right to deny it the right to carry others of the same class merely because they had not been transported previously and that it had no right to restrict the carrier to the transportation of those commodities which had been carried with more frequency and in greater quantities than other commodities. This Court refused to allow the Commission to atomize the carrier's prior service, product by product, so as to restrict the scope of his operations where there was substantial evidence that he was in bona fide operation as a carrier of a large group of commodities or of a whole class of property.[32] *Id.* at 483-484.

When the broad nature of Nelson's holding out and the wide variety of commodities actually transported are considered, there is considerable doubt as to whether or not the permit issued to him grants all the rights to which he is entitled under the grandfather clause even without the Commission's restrictive interpretation through the application of the intended use test. Under the commodity description "*stock* in trade of drug stores", as appellant interprets it, only such commodities as are customarily held for sale to customers by drug stores may be transported; whereas a perusal of the commodities transported during the grandfather period indicates that Nelson was actually hauling a broader range of commodities, e.g., dime store merchandise, slate, flagstone, marble, plumbing and heating supplies and fixtures, electrical equipment, and automobile bodies and transmissions. (Appendix A, *Infra*, p. 48.) In fact, there is some question as to whether or not the Commission intended to restrict Nelson to the transportation of stock in trade of drug stores.

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[32] This interpretation squares with the legislative history of the grandfather clause. In explaining the Senate's amendments to Section 209, Senator Wheeler stated (79 Cong. Rec., Pt. 5, p. 5654):

> This section has been changed * * * to make clear that the bill applies to the business of contract carriers and not merely to particular operations under the individual contracts.

Nelson had applied for a permit to transport "store fixtures, *miscellaneous merchandise* and household furniture." (D.C. Ex. 2; R. 38, 248. Italics supplied.) In connection with the application, Nelson submitted delivery tickets which described the commodities transported, generally, as miscellaneous store fixtures, *merchandise*, and household furniture, and a schedule of minimum rates or charges in which he quoted rates for store fixtures, *miscellaneous merchandise*, household goods and furniture. (D.C. Ex. 2; R. 38, 269-270, 273.) As was usual in processing grandfather applications, no hearing was held, but the application was handled through the Commission's field investigators. (R. 244.) *Neuendorf Transportation Co. v. United States*, 145 F. Supp. 672 (E. D. Wis. 1956). In 1938, the Commission issued its compliance order reciting that Nelson had applied for a permit according to the specification set forth on the reverse side and had been in operation in that manner, and ordering that a permit should be issued in accordance with that specification. (I.C.C. Ex. 5; R. 215, 230.) However, the specification on the reverse side which was referred to in order to identify (1) the operating authority requested in the application, (2) the scope of Nelson's prior grandfather operations, and (3) the operating authority to be granted in the permit, reads as follows (R. 231):

> *New and used store fixtures, new and used household goods,* and *stock* in trade of drug stores.

Nowhere in the documents that were before the Commission when the compliance order was issued was there any reference to stock in trade of drug stores. Therefore, either the compliance order was in error when it recited that Nelson had applied for a permit according to the specification on the reverse side and that he had been operating in that manner or the specification erroneously read "*new and used store fixtures, new and used household goods,* and *stock* in trade of drug stores" instead of "store fixtures, miscellaneous merchandise, and household furniture" (the language used in the application and in the documents submitted in support of the application).

Unless appellant is permitted to transport such merchandise as is dealt in by drug stores, regardless of the consignor, consignee, or ultimate destination of those commodities, appellant contends that its permit does not accord the substantial parity of operations guarantied by the grandfather clause of the Interstate Commerce Act, Part II, and that on the basis of the evidence of Nelson's grandfather operations the Commission should have altered the permit accordingly.

III.

THE COMMISSION'S REPORT AND ORDER VIOLATE THE REQUIREMENTS OF THE ADMINISTRATIVE PROCEDURE ACT.

A. The Commission's report lacks findings and conclusions with respect to all material issues of fact and law, with reasons and bases therefor, as required by Section 8 (b) of the Administrative Procedure Act.

It is apparent that evidence as to the scope of Nelson's grandfather operations is of great importance in this case either as an aid to interpretation or as an indication of whether or not appellant's permit conforms to the requirements of the grandfather clause of part II of the Interstate Commerce Act. Actually, most of the documents and testimony submitted at the hearing by both parties concerns the subject of Nelson's grandfather operations. Nevertheless, the Commission ignored all evidence of the events underlying the issuance of Nelson's permit in determining whether or not appellant was transporting commodities not authorized by its permit. (R. 237.)

Section 8 (b) of the Administrative Procedure Act, *supra*, p. 3, requires that, in a case of this nature, the decision include a statement of findings and conclusions, as well as the reasons or bases therefor, upon all material issues of fact, law, or discretion presented on the record. *Howard Hall Co. v. United States*, 315 U.S. 495 (1942). In view of the importance in this case of findings and conclusions as to the scope of Nelson's grandfather operations, the Commission's refusal to make those findings and conclusions violates the requirements of Section 8 (b) and its decision should not be sustained.

B. The Commission's cease and desist order is arbitrary and capricious, represents an abuse of discretion, exceeds its statutory limitations, denies appellant its statutory rights and is unsupported by substantial evidence, in violation of Section 10 (e) of the Administrative Procedure Act.

Section 10 (e) of the Administrative Procedure Act, *supra*, p. 4, defines the scope of judicial review of administrative decisions, and provides that the reviewing court shall hold unlawful and set aside any agency's action found to be arbitrary, capricious, or an abuse of discretion, in excess of its statutory limitations, or short of statutory right, or unsupported by substantial evidence.

The Commission's cease and desist order is arbitrary and capricious. This is well illustrated by the procedure followed. The investigation into appellant's operations was initiated by an order which, in effect, recited that appellant had been hauling certain enumerated commodities outside the scope of its permit and then ordered a hearing to determine whether or not appellant had been hauling commodities outside the scope of its permit. (D. C. Ex. 1; R. 38, 46.) Obviously, such an order presaged a foregone conclusion that appellant had violated the terms of its permit and indicated that the hearing would be a mere formality. If the Commission had been convinced (as apparently it was) that appellant had transported unauthorized commodities, the most direct approach would have been to apply to the district court for an injunction under Section 222 (b) of part II of the Interstate Commerce Act (49 U.S.C. 1952 ed., Sec. 322 (b)). Instead, the Commission chose to initiate an investigation under Section 204 (c) of the Act (49 U.S.C. 1952 ed., Sec. 304 (c))—a proceeding which would appear to be appropriate only where the

Commission was seeking facts and not where it already had sufficient details concerning the alleged violations to draw what amounts to a bill of particulars. No doubt the Commission chose this method of attacking appellant's operations because it had been denied an injunction in an almost identical situation by the same district court to which it would have had to apply for an injunction against appellant.[33] By choosing to bring the case before its own administrative tribunal, the Commission was able to approach the reviewing court with a presumption of the correctness of its own interpretation of appellant's permit. *Converse* v. *United States*, 109 F. Supp. 807 (N. D. Calif. 1953); *Dart Transit Co.* v. *Interstate Commerce Commission*, 110 F. Supp. 876 (Minn. 1953), motion to affirm granted, 345 U.S. 980 (1953).

The Commission's cease and desist order represents an abuse of discretion, exceeds its statutory limitations, and denies appellant its statutory rights. The Commission restricted appellant's operating rights, guarantied by Congress in the grandfather clause of the Interstate Commerce Act, Part II, by construing its permit in the light of an interpretive device never intended to be applied to a commodity description such as that contained in appellant's permit. See Point I of the Argument.

The Commission's cease and desist order is not supported by substantial evidence. If the commodities alleged to have been hauled in violation of appellant's permit are of the same kind as were hauled during the grandfather period, appellant has a right to transport them now, regardless of what the Commission now construes the language of its permit to mean. *Bison Freight Lines* v. *Northwest Dispatch Inc.*, 60 M.C.C. 505 (1954). However, the Bureau offered no evidence that the commodities allegedly hauled in violation of the permit had not been hauled during the grandfather period, and appellant did offer evidence to the contrary. (Appendix A, *infra*, p. 48.) Therefore, the Commission's finding that appellant has transported commodities without the scope of its permit is not supported by substantial evidence. (R. 240, 246.)

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[33] In *Interstate Commerce Commission* v. *Ratner*, 6 Federal Carriers Cases, par. 80,415 (N.D. Ill. April 15, 1947), the court held that a commodity description "such *merchandise* as is dealt in by wholesale food business houses, and * * * *equipment, materials,* and *supplies* used in the conduct of such business" authorized the transportation of beer and empty beer containers from a brewery to a distributor inasmuch as wholesale food business houses did deal in and distribute beer.

CONCLUSION.

Appelant is fully aware of the rule that administrative decisions should not be disturbed unless arbitrary, capricious and clearly erroneous. Nevertheless, there are limits to the power of an agency such as the Interstate Commerce Commission, and it is the function of the courts to see to it that such agencies have not exceeded their statutory powers and have observed the rudiments of fair play.

In this case, we believe it is clear that the Commission has unjustifiably restricted the operating authority of a grandfather contract carrier permit (1) by misapplying an insidious interpretive device; (2) by implying a restriction on a generic commodity authorization which was unknown when the permit was granted; (3) by ignoring appellant's rights under the grandfather clause of part II of the Interstate Commerce Act; and (4) by violating the procedural requirements of the Administrative Procedure Act.

The Commission's cease and desist order should be held unlawful and set aside.

Respectfully submitted,

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September, 1957

APPENDIX A.

SUMMARY OF ANDREW G. NELSON'S TESTIMONY REGARDING COMMODITIES HAULED DURING GRANDFATHER PERIOD AND COMPARISON WITH COMMODITIES HAULED BY APPELLANT (ALLEGEDLY IN VIOLATION OF ITS PERMIT) BETWEEN JULY 31 AND DECEMBER 7, 1953.

Commodities transported July 31 - Dec. 7, 1953	Comparable commodities transported on and before July 1, 1935	Consignor	Record Reference
groceries (generally): canned or packaged grocery items dry cream, milk and malted milk liquid cream fruit juices candy	groceries (generally): sugar	Godchaux Sugar Co.	81, 149
		Packer Sugar Co.	83, 152
		Franklin Sugar Co.	83, 152
	salt	Myles Salt Co.	83-84, 152
	chili products *	Gebhard Chili Co.	83, 151
	brandied fruits	Renault, Inc. (manufacturer)	83, 151
beer and wines	malt drinks	Goetz Brewing Co.	81, 150
	wines and liquors *	Judge & Dolph (distributor)	84, 152
dry glue	fertilizer	Armour Fertilizer Co.	81, 150
automobile batteries	electrical equipment *	Loyal Electric Co. (manufacturer)	79, 148
	steel bodies, transmissions *	Hendrickson Motor Truck Co. (manufacturer)	80
Fibreboard boxes	paper products *	Freeman Paper Co.	81, 149 - 150
	paper	Peerless (Seiberling?) Paper Co.	84, 152
	wiping rags	Robinson Waste Co.	81, 150
kitchen, storage or wardrobe cabinets or lockers	new furniture *	Grand Rapids Furniture Co. (dealer)	79-80
	new and used furniture *	Gordon Furniture Co. (dealer)	80
	furniture	M. J. Sanborn Co. (dealer)	80, 149
	furniture, etc.*	L. Pine (K. Klein?) & Co.	84, 152
	safes & steel cabinets	Mosler Safe Co.	81, 150
	safes	Busse Safe Co. (manufacturer)	83, 151
drugs and medicines	toiletries *	Melba Mfg. Co.; Schulte Bros.	78
		Federated Drug Co. (broker)	80, 149
		Buy Right Drug Co.	80, 149
	toiletries & chemicals *	A. C. Drury Co.	80, 149
	witch hazel	A. E. Childs & Co. (manufacturer)	83, 151

beer and wines	malt drinks	Goetz Brewing Co.	81, 150
	wines and liquors *	Judge & Dolph (distributor)	84, 152
dry glue	fertilizer	Armour Fertilizer Co.	81, 150
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* Indicates commodities being transported for customer during 1935. Nelson lost some of his customers in the early 1930's because of the depression (R. 79, 80, 148-152) and his testimony, based on memory (R. 77, 158), is not as clear as might be desired as to when he ceased hauling for certain customers. However, he did testify that he was hauling for all customers mentioned during 1935 unless otherwise specified. (R. 77, 82, 84.)

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No. 16

In the Supreme Court of the United States

OCTOBER TERM, 1957

ANDREW G. NELSON, INC., APPELLANT
v.
UNITED STATES OF AMERICA, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

BRIEF FOR THE UNITED STATES AND THE INTERSTATE COMMERCE COMMISSION

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OPINION BELOW

The opinion of the district court (R. 276-289) is reported at 150 F. Supp. 181. The report of the Interstate Commerce Commission (R. 234-246) is reported in 63 M. C. C. 407.

JURISDICTION

The final judgment of the district court was entered on June 13, 1956 (R. 290). Notice of appeal was filed on July 2, 1956 (R. 291-294). The jurisdiction of this Court is conferred by 28 U. S. C. 1253 and 2101 (b). Probable jurisdiction was noted on November 13, 1956.

STATUTES INVOLVED

The pertinent provisions of the Interstate Commerce Act and the Administrative Procedure Act are set forth in the Appendix, *infra*, pp. 33–37.

QUESTIONS PRESENTED

1. Whether the Interstate Commerce Commission might reasonably construe a permit which it issued authorizing the hauling of "stock in trade of drug stores" as not covering the hauling of dried glue for manufacturers of gummed products, automobile batteries for department stores, and other commodities which were not and were never intended to become the stock in trade of any drug store.

2. Whether, in order to construe the phrase "stock in trade of drug stores" appearing in a "grandfather" permit issued in 1942, the Commission must consider evidence which was unknown to the Commission at that time indicating that appellant's predecessor may also have hauled flagstone, bricks, steel bodies and other items.

3. Whether the Commission's report and order are supported by adequate findings and substantial evidence, and whether the Commission's action in entering the cease and desist order was arbitrary or capricious.

STATEMENT

Following the enactment of the Motor Carrier Act of 1935 (Appendix, *infra* pp. 33–36) appellant's predecessor in interest, one Andrew G. Nelson, doing business as Nelson Warehouse & Express Co., applied for a permit under the "grandfather" clause in the first proviso to Section 209 (a) (1) of the Interstate Commerce Act, as amended. The signed statement submitted by Nelson in support of his application described his business as follows:

> That he is an interstate contract carrier of property for the Walgreen Company and for it alone. That he hauls to and from Walgreen Retail Stores located within 600 miles of Chicago. That said transportation has to do with the opening, the remodeling, and/or the closing of Walgreen retail stores, the commodities so transported are usually store fixtures and equipment and merchandise for the opening stock. [R. 217–220.]

The statement was accompanied by delivery receipts showing interstate contract movements for Walgreen Company in the period from June 27, 1934, to September 21, 1935. No receipts indicating any other carriage were submitted. Appellant recognizes (Br. 10–12) that all of the documents submitted in connection with the application "confirm the impression that Nelson was hauling only for Walgreen" (Br. 11).

As was the practice, no hearing was held on the "grandfather" application, the Commission relying instead on the statements of the applicant himself. The entire record in the "grandfather" application, docket No. MC–1194 of Andrew G. Nelson, was incorporated into the record in the investigation proceeding here under review,[1] and is included in the record before this Court.

On March 13, 1942, the permit was issued. It authorized Nelson to engage as a contract carrier in the transportation of (R. 16):

> *New and used store fixtures, new and used household goods*, and *stock* in trade of drug stores, over irregular routes,
>
> > Between points and places in Illinois, Indiana, Iowa, Kentucky, Michigan, Minnesota, Missouri, Nebraska, Ohio, and Wisconsin.[2].

---

[1] In note 10 on page 11 of its brief the appellant states that despite repeated demands the Commission has refused to make available to appellant's counsel a report made by Mr. Petritz (former District Supervisor of the Commission), concerning the "grandfather" application said to be contained in a "confidential" file. The "confidential" portion of this so-called "report," a copy of which has been furnished appellant's counsel, reads in full as follows:

> 13. A protest to the granting of a Permit to applicant has been filed by the Chicago Rock Island & Pacific and two other western railroads, stating that applicant had not been licensed or permitted in Missouri. Applicant stated that the Walgreen Company operated only in two cities in Missouri—St. Louis and Webster City; that he did not average more than one trip per month into Missouri and that in this, and certain other States, he did not feel it necessary to secure State permission because of the nature of his transportation and the infrequency of his trips.
>
> 14. It is my belief that the operation of Andrew G. Nelson is one of contract carriage and I recommend that a Permit be granted to him to operate over irregular routes in the States of Illinois, Indiana, Iowa, Kentucky, Michigan, Minnesota, Missouri, Nebraska, Ohio and Wisconsin in order to service present and future Walgreen Company retail stores as he has for the past seventeen years.

Paragraphs 1 to 12 of this "report" already appear in the record (R. 217-220).

[2] The portions of the permit appearing in italics were under-

The critical language here involved is "stock in trade of drug stores". In 1951, Andrew G. Nelson incorporated his business, and the Commission issued a new permit to the corporation embracing the same operating rights as those granted its predecessor and using the same language (R. 26).

In 1954, the Commission, acting upon information received, instituted an investigation to ascertain whether or not the appellant "is and has been engaged in the transportation of commodities not within the scope of its operating authority" (R. 17-19).

Hearing was held before an examiner at which time evidence was adduced establishing that the appellant had, during 1953, transported the following commodities in truck load lots to the consignees indicated. (See appellant's brief, page 7.)

Commodities	*Business of Consignees*
canned or packaged grocery items	grocery stores or warehouses
dry and liquid cream and fruit juices	food manufacturers
beer and wines	liquor distributors
dry glue	manufacturers of gummed products
candy	wholesale candy distributor
dry milk	dry milk distributor
malted milk powder, milk food, drugs and medicine	manufacturers of drugs and dietetic foods
automobile batteries	department stores
fibreboard boxes	dairy
kitchen, storage or wardrobe cabinets or lockers	not indicated in record

---

scored in the original permit. Neither party appears to attach significance to that fact. In quoting the phrase "stock in trade of drug stores" in this brief we omit, for ease in reading, underlining or italicizing the word "stock".

Upon completion of the administrative proceeding, the Commission issued its report (R. 19–31). The Commission said: "The sole issue herein is thus explicit and requires a determination of the extent of the authority granted by the commodity description '*stock* in trade of drug stores'" (R. 27).

The Commission found that the term includes those commodities delivered to a drug store or which are earmarked for eventual delivery to and sale in a drug store. The Commission further found that the appellant was not authorized to transport the commodities described above; and ordered it to cease and desist from engaging in such transportation in the future (R. 31–32). Upon review of the proceeding, the three-judge district court (one judge dissenting) upheld the Commission's findings and order (R. 276–284, 290).

SUMMARY OF ARGUMENT

I

This is a proceeding requiring appellant to limit its motor carrier operations to those authorized by its permit. The only issue is one of construing the permit that was issued to its predecessor, Nelson, in 1942. Based on the application and statements of Nelson as to his "grandfather", *i. e.*, pre-1935, operations, the permit authorized Nelson to haul "stock in trade of drug stores". The Interstate Commerce Commission has construed that permit as *not* allowing appellant to transport such commodities as dried glue for a manufacturer of gummed products and automobile batteries for department stores.

A. Construing the scope of an existing permit does not constitute a modification or a revocation of a permit. The statutory procedures for revoking a permit are not applicable. The order of the Commission took no rights from appellant. The order merely interprets what rights appellant and its predecessor have had from the beginning.

B. The Commission properly refused to consider evidence concerning the operations of appellant's predecessor during the "grandfather" period. First, appellant itself, in this proceeding, objected to the consideration of such evidence, contending that the permit must be construed on its face. Appellant cannot now argue that it was error for the Commission to follow the view it urged. Second, actual operations of Nelson, unknown to the Commission until this proceeding, could have no bearing on the construction of the 1942 permit. It might become necessary or desirable to consider the statements made to the Commission and on which it relied in issuing the permit. But operations of appellant's predecessor, which were not known to the Commission at the time it issued the permit, could not possibly shed light on the meaning of the language used by the Commission in the permit.

II

The Commission's interpretation of the phrase "stock in trade of drug stores" is reasonable and must be sustained.

A. The Commission has construed the language consistently with its plain meaning. The language used in the permit appears unambiguous. If "stock in trade of drug stores" means what it says, appellant's permit authorizes it to transport those items which are in fact the stock in trade of an enterprise which is a drug store. The language on its face lends no support to appellant's position that it may transport anything to anybody so long as an item similar to that transported might be sold in a drug store.

B. Only where there is ambiguity should the Commission refer to the record upon which the permit was based. But if the phrase here be deemed ambiguous, the record makes clear that the Commission's construction is correct. Appellant itself recognizes that the application and the other documents submitted at that time convey the impression that the only hauling which Nelson was engaged in was for the Walgreen chain of drug stores. The record upon which the Commission acted in issuing the 1942 permit was a record indicating that the only merchandise being hauled was that which was intended to be used by drug stores as their stock in trade. In the light of the record upon which the permit was issued, it is inconceivable that the Commission intended to authorize Nelson to engage in the general hauling of all goods similar to those dealt in by drug stores.

C. The Commission's construction of the permit is consistent with prior decisions in other cases. Since the beginning of motor carrier regulation the Commission, as one means of describing commodities in permits and certificates, has identified them by reference to the intended future use. Similar permits have been construed in other cases in the same way as appellant's permit has been construed here; and the Commission's orders have regularly been upheld. If the Commission had intended to confer the broader authority claimed by appellant it could have authorized it to transport "such general merchandise as is dealt in by" drug stores, language which has been used in other cases. The Commission has not imposed a "Keystone" restriction since appellant may contract with any class of shippers so long as the commodities are intended to be used as stock in trade of drug stores.

III

There is no merit in the contention that the Commission's cease and desist order is not supported by adequate findings and substantial evidence, and that its action was arbitrary and capricious.

The evidence of record shows that appellant transported 51 shipments to consignees other than drug stores (Comm. Exhibit No. 2, R. 221–226, 54–57). Under those circumstances, the burden rested upon the appellant to prove that the shipments, although not moving to a drug store, were eventually intended for delivery to a drug store, in order to meet the Commission's "intended use" test. *Dart Transit Co.* v. *Interstate Commerce Commission,* 110 F. Supp. 876, 880 (D. Minn.), affirmed, 345 U. S. 980. The appellant did not meet that burden of proof.

The Commission thereupon found, after properly interpreting the permit, that the appellant, in transporting those shipments, had exceeded the scope of its authority. The issue presented did not warrant nor require extensive findings. We submit that the Commission's report, when read as a whole, contains all findings necessary and complies fully with the decisions of the courts and the provisions of the Administrative Procedure Act.

IV

If, as appellant contends, the permit is less broad than the "grandfather" operations upon which it is based, its remedy, which it has not followed, is to petition the Commission to reopen the "grandfather" application and allow the introduction of additional evidence in that proceeding. The 1942 permit is at least as broad as that justified by Nelson's representations made at that time. Appellant contends that in fact Nelson was not merely hauling for the Walgreen company but was also transporting a wide selection of commodities including brick, flagstone, steel bodies and plumbing and heating supplies. In no way can the phrase "stock in trade of drug stores" be stretched by construction to provide appellant with the permit he claims. His collateral attack upon the permit cannot be permitted in a proceeding to enforce his compliance with the permit that was issued.

In recent years, despite the lapse of time, the Commission has, where adequate grounds are shown, been willing to entertain petitions to reopen original "grandfather" permit and certificate proceedings, take additional evidence, and broaden the scope of the "grandfather" permit or certificate. Whether appellant would be successful in such a proceeding cannot be known, but, if appellant has a legitimate grievance, that is where its remedy lies.

ARGUMENT

I

THE SOLE QUESTION IN THIS PROCEEDING IS THE CORRECT CONSTRUCTION OF THE PERMIT THAT WAS ISSUED

This is a proceeding to require appellant to limit his motor carrier operations to those covered by its permit. Under its permit, appellant is allowed to transport "stock in trade of drug stores". He has been ordered to cease and desist transporting such items as automobile batteries for department stores and dried glue for manufacturers of gummed products. Appellant is here contending that the only reasonable construction of the permit which authorizes it to transport "stock in trade of drug stores" is one which will allow it to transport dried glue and automobile batteries for businesses which are concededly not drug stores. Before turning to the reasonableness of the Commission's construction of the permit which the Commission issued (Point II, *infra,* p. 18), we must emphasize that the only issue here is one of the correct construction of the permit first issued in 1942. The Commission has taken no action which alters or revokes any rights which appellant has ever had.

A. DETERMINING THE CORRECT CONSTRUCTION OF APPELLANT'S PERMIT DOES NOT CONSTITUTE A MODIFICATION OR REVOCATION OF THE PERMIT

The proceeding under review was instituted under the provisions of Section 204 (c) of the Interstate Commerce Act (49 U. S. C. 304 (c)) to determine whether or not the appellant had engaged in motor carrier operations beyond the scope of its permit. In order to make such determination it was necessary for the Commission to interpret the appellant's permit.

It is well settled that the construction of the scope of permits and certificates issued by the Commission is within its province and should not be overturned unless clearly erroneous.[3]

In *Dart Transit Co.* v. *Interstate Commerce Commission,* 110 F. Supp. 876, 880 (D. Minn.) affirmed, 345 U. S. 980, the district court stated:

> In *Noble* v. *United States,* 319 U. S. 88, 93, * * * the Supreme Court said that "The precise delineation of an enterprise which seeks the protection of the 'grandfather' clause has been reserved for the Commission." By the same token we think that within reasonable limits it is for the Commission to determine the scope of the "delineation."

To the same effect is *Malone Freight Lines, Inc.* v. *United States, et al.,* 107 F. Supp. 946, 949 (N. D. Ala.); affirmed, 344 U. S. 925, rehearing denied, 345 U. S. 914.

The fact is that the Commission in many cases has interpreted its permits and certificates, either in connection with the issuance of cease and desist orders, as was done here, or upon petition of the holder of the permit or certificate or some carrier competitor. Likewise, in numerous instances, the courts, in arriving at their decisions, have found it necessary to make such interpretations. *Black* v. *Interstate Commerce Commission,* 167 F. 2d 825; *Southwest Freight Lines, Inc.* v. *Interstate Commerce Commission,* 184 F. 2d 149. There is nothing novel in the interpretation of the scope of permits and certificates.

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[3] *United Truck Lines* v. *Interstate Commerce Commission,* 189 F. 2d 816, 817 (C. A., 9), certiorari denied, 342 U. S. 830; *Adirondack Transit Lines* v. *United States,* 59 F. Supp. 503, 504 (S. D. N. Y.), affirmed, 324 U. S. 824; *Malone Freight Lines, Inc.* v. *United States, et al.,* 107 F. Supp. 946, 949 (N. D. Ala.), affirmed 344 U. S. 925; *Converse* v. *United States,* 109 F. Supp. 807, 808 (N. D. Cal.); *Dart Transit Co.* v. *Interstate Commerce Commission,* 110 F. Supp. 876, 880 (D. Minn.), affirmed, 345 U. S. 989; *Salvino* v. *United States,* 119 F. Supp. 277, 281 (W. D. Wash.)

In an extended discourse in its brief (pages 23 to 36) the appellant contends that the Commission's action in the present proceeding constituted an unlawful revocation or modification of the permit, contrary to the provisions of Section 212 (a) of the Act (49 U. S. C. 312 (a)). The Commission's action in no sense resulted in a deprivation or diminution of appellant's authority. This claim is invariably made by carriers when the Commission finds that they are conducting operations in excess of the scope of their authority. There, of course, is no basis for such contention, as was pointed out in *Willers* v. *United States,* 133 F. Supp. 270, 275 (D. S. D.), where the district court said, "The orders which plaintiff herein asks us to set aside take no rights from him, they merely interpret what rights he had from the beginning."

The Commission, in several decisions, has taken note of such claims, and emphasized that its interpretation of a permit or certificate is no more than a declaration of the carrier's authority, and is not a revocation or modification of that authority. *Greenberg—Investigation of Operations,* 52 M. C. C. 25, 28; *Dunn Extension—Radio Sets,* 54 M. C. C. 233, 236.

The appellant, in support of its argument in this regard, relies primarily upon the decisions in *Salvino* v. *United States*, 119 F. Supp. 277 (W. D. Wash.); *Bird Trucking Co., et al.* v. *United States*, 11 Fed. Carriers Cases 2115, and *United States* v. *Seatrain Lines*, 329 U. S. 424. All of these cases are clearly distinguishable from the case at bar.

In both the *Salvino* and the *Bird* cases, it was contended by the parties that the commodity descriptions in the respective certificates were ambiguous, and conflicting evidence was presented in support of the widely divergent views. Moreover, in the *Salvino* case, the court found that the Commission had rejected the issues as framed by the parties, and reframed them subsequent to the hearing without giving the parties an opportunity to meet the new issues, contrary to the decision of this Court in *Morgan* v. *United States*, 304 U. S. 1, 18.

In the *Seatrain* case, *supra*, the Commission reopened that water carrier's grandfather application dockets and canceled the prior certificate as having been inadvertently issued without certain conditions, and directed that a new certificate be issued containing the conditions which did not appear in the old certificate. The Commission's power to do so was denied by this Court. In the instant case, no such action was attempted by the Commission. It did not change appellant's permit in any particular, but merely interpreted the operating rights of the individual Nelson under his permit from its issuance in 1942. Clearly, the *Seatrain* decision is wholly inapplicable to the present action.

B. THE COMMISSION PROPERLY REFUSED TO CONSIDER EVIDENCE CONCERNING THE OPERATIONS OF APPELLANT'S PREDECESSOR PRIOR TO THE ISSUANCE OF THE "GRANDFATHER" PERMIT

Appellant now contends (Br. 36-43) that "The Commission erred in refusing to consider evidence of Nelson's 'grandfather' operations." But appellant previously requested that such evidence *not* be considered and, under the circumstances, it could have no bearing on the correct construction of the 1942 permit.

1. *Appellant objected to the consideration of any evidence as to the scope of the "grandfather" operations.* At the hearing in the proceeding under review there was offered in evidence by the counsel for the Bureau of Law of the Commission a certified copy of the proceeding before the Commission in Docket No. MC-1194 on the application of appellant's predecessor for a "grandfather" permit. Counsel for the appellant interposed the following objection thereto:

> Mr. BLANCHARD. I understand that with this last witness, the case of the Commission and the Interveners is now closed, and that side rests. At this time I would like to move to strike pages 1, 3 and 4 of Commission's Exhibit 1, on the ground that since the wording of the permit is not ambiguous or uncertain, that the Commission under the Seatrain case is without authority to consider events existing prior to the issuance of the permit and simultaneously with that, I move to dismiss the proceeding on the ground that no violation of the law has been shown as to any of the articles of transportation with which the record thus far concerns itself [R. 114].

* * * * * *

> * * * If some violation of law had been shown or some uncertainty or ambiguity had been shown, I would be the first to concede that we might go into these earlier matters, to find out and resolve the ambiguity, but my point is that no ambiguity having been shown, the Supreme Court decision in the Seatrain case and other decisions of the Federal court estops the Commission from going back and considering anything that happened back of the permit [R. 115–116].

In its report (R. 22) the Commission, in effect, sustained appellant's motion to strike the evidence referred to when it said:

> We agree with the contention of the parties and the examiner's conclusion that there is no such patent ambiguity in the permit as to warrant going back of it and giving consideration to events prior to its issuance. * * *.

It is submitted that the appellant should not now be heard to complain that the Commission refused to consider evidence antecedent to the "grandfather" grant, and it is precluded from contending in this action that the Commission erred in failing to consider such evidence. *United States* v. *L. A. Tucker Truck Lines*, 344 U. S. 33, 36–37; *General Transportation Co., et al.* v. *United States, et al.*, 65 F. Supp. 981, affirmed *per curiam*, 329 U. S. 668, rehearing denied, 329 U. S. 827; *Transamerican Freight Lines, Inc.* v. *United States, et al.*, 51 F. Supp. 405; *United States* v. *Capital Transit Co.*, 338 U. S. 286, 291.

2. *Actual "grandfather" operations, unknown to the Commission, could have no bearing on the construction of the 1942 permit.* As pointed out above, the permit issued in 1942 was based upon statements submitted by appellant's predecessor. If the permit were ambiguous, it might be necessary to consider the application and the statements made to the Commission at that time. We discuss below, *infra*, pp. 18–22, the construction of the permit on its face and in the light of the application. But the operations of appellant's predecessor, unknown to the Commission at the time it issued the permit, could not possibly shed light on the meaning of the language used by the Commission in its permit.

The absurdity of appellant's position that the Commission should have considered evidence as to what was actually hauled by appellant's predecessor before 1935 is demonstrated by appellant's brief in this Court. Appellant's brief (pp. 48–49) summarizes commodities which Nelson now contends were hauled prior to 1935. Among these are electrical equipment, steel bodies, transmissions, slate, flagstone, plumbing and heating fixtures, and bricks. Appellant in effect argues that "stock in trade of drug stores" must be construed to cover these items since they were (it now says) hauled prior to 1935. Aside from the patent impossibility of construing "stock in trade of drug stores" to cover steel bodies and flagstone, there is no logic in seeking to do so. If appellant's predecessor actually transported such items prior to 1935, the Commission had no knowledge of it. In using the phrase "stock in trade of drug stores" it could not have intended the permit to cover particular items about which it had no knowledge. What appellant's predecessor may actually have hauled, unknown to the Commission and not referred to in the documents filed in support of the application for a permit, could not shed any light on the intended scope of the permit. Since appellant asked the Commission not to consider such evidence, and since it has no bearing on the construction of the 1942 permit, the Commission correctly refused to consider evidence of Nelson's "grandfather" operations.

II

THE COMMISSION'S INTERPRETATION OF THE PHRASE "STOCK IN TRADE OF DRUG STORES" IS REASONABLE AND MUST BE SUSTAINED

A. GIVEN ITS PLAIN MEANING, "STOCK IN TRADE OF DRUG STORES" REFERS TO COMMODITIES WHICH ARE IN FACT THE STOCK OF AN ENTERPRISE WHICH IS A DRUG STORE

Once it is recognized that the sole issue is one of construing the permit issued in 1942, it is apparent that the Commission's position must be sustained. The Commission's determination in the instant case clearly was not arbitrary. The phrase would appear unambiguous. If "stock in trade of drug stores" is construed to mean what it says, appellant's permit authorizes it to transport those items which are in fact the stock in trade of a drug store. The commodities it transports must at some point be the stock in trade of a drug store.

Appellant argues that a permit to transport the stock in trade of a drug store is a permit to transport anything to anybody so long as an item similar to that transported might be sold in a drug store. In this way appellant argues that his permit allows him to transport dry glue to a manufacturer of gummed products on the theory that some drug stores sell glue. We do not believe it is possible to construe "stock in trade of drug stores" as embracing industrial shipments of dry glue. But if such a construction is possible, it is certainly not necessary. Considering the permit on its face, the construction placed upon it by the Commission is reasonable. It must be sustained.

B. ANY AMBIGUITY IN THE PERMIT IS RESOLVED BY CONSIDERING IT IN THE LIGHT OF THE REPRESENTATIONS ON WHICH IT WAS BASED

In the proceeding before the Commission appellant took the position that the term "stock in trade of drug stores" as used in the appellant's permit, was not ambiguous. This is pointed out in the Examiner's report adopted by the Commission (R. 27):

> The sole issue herein is thus explicit and requires a determination of the extent of the authority granted by the commodity description "*stock* in trade of drug stores." None of the parties claim that such description is patently ambiguous, and ambiguity may not be assumed merely from the fact that the bureau and interveners are in disagreement with respondent as to the meaning of the description.

Only in those instances where a permit is patently ambiguous does the Commission refer to the record upon which it was issued in order to determine its meaning. This principle has been recognized by the

Commission in many of its decisions. For example, see *Asbury Park–New York Transit Corp.* v. *Bingler Vacation Tours, Inc.*, 9 Fed. Carriers Cases 451; *P. Saldutti & Sons, Inc., Interpretation of Permit*, 63 M. C. C. 593, 594.

For obviously sound reasons the Commission, in interpreting permits and certificates, is normally disinclined to consider evidence pertaining to the "grandfather" operations upon which they were based. To do so would create uncertainty among carriers and the public as to the scope of the authority, and would impede the Commission in its enforcement of the Act. Neither the holder of a "grandfather" permit or certificate nor a prospective purchaser, could be sure of the scope of the authority if it were subject to reexamination by the Commission at any time in the light of the facts which existed prior to the "grandfather" date.

But if there were thought to be any ambiguity, it would be settled by considering the permit in the light of the application and statements which appellant's predecessor in interest made in support of it. As we point out above, *supra*, pp. 17–18, actual operations of appellant's predecessor, unknown to the Commission, could shed no light on the scope of the authority which the Commission intended to convey by the language of the permit. To resolve any possible ambiguity in the permit the "legislative history" which should be examined is that upon which the permit was based. It may be assumed that the permit was not intended to be any broader than the maximum "grandfather" operations claimed by Nelson. What were the operations claimed by Nelson which, at the most, the permit could have been intended to cover?

The entire record in the "grandfather" application (docket No. MC–1194) was incorporated into the record in the investigation proceeding here under review and is included in the record before this Court. But there is no need to examine it in detail. Appellant agrees that the applications and the statements filed with it convey the impression that Nelson was doing no hauling of any kind except for a particular chain of drug stores:

> Nelson's answers to the various questions give the impression that, as of July 1, 1935, he had only one contract—with the Walgreen Company—* * *. [Br. 10]
>
> * * * * *
>
> * * * all of which confirm the impression that Nelson was hauling only for Walgreen. [Br. 11]
>
> * * * * *
>
> Like the application itself, the statement gives the impression that Nelson's only contract was to haul store fixtures, equipment and merchandise in connection with the opening, closing, or remodeling of Walgreen Drug Stores and to haul household goods for Walgreen's employees at Walgreen's expense. (D. C. Ex. 2; R. 38, 263–265.) This impression is confirmed by certain documents attached to the statement * * *. [Br. 11]

The application and supporting documents did *not* state that Nelson was engaged in the general hauling of goods similar to those sold by drug stores. On the contrary, these documents clearly indicated, and appellant so agrees, that the stock in trade which Nelson was hauling was the stock in trade of a particular chain of drug stores. The commodities which he was hauling were ones which were intended to be used by drug stores as their stock in trade.

In the face of these facts it is inconceivable that the Commission, in issuing the 1942 permit, intended to authorize Nelson to engage in the general hauling of all goods similar to those dealt in by drug stores. Such a permit was not the one asked for by Nelson[4] and it certainly would not have been justified on the basis of the application and statements which Nelson submitted. Any doubt as to the correctness of the Commission's construction of the permit is thus removed by considering the permit in the light of the statements made to the Commission and upon which the Commission relied in issuing the permit.

C. THE COMMISSION'S CONSTRUCTION OF THE PERMIT, LIMITING APPELLANT TO THE HAULING OF GOODS INTENDED TO BE USED AS STOCK IN TRADE OF A DRUG STORE, IS CONSISTENT WITH PRIOR DECISIONS IN OTHER CASES.

In interpreting appellant's permit the Commission applied the "intended use" test. Since the beginning of motor carrier regulation, the Commission, as one means of describing commodities in its permits and certificates, has identified those commodities "by reference to the intended future use." *C & H Transportation Co., Inc.—Interpretation of Certificate*, 62 M. C. C. 586, 587; *Crouch—Modification of Certificate*, 53 M. C. C. 436, 440; *P. B. Mutrie Mtr. Transportation Inc.* v. *Blue Line Express, Inc.*, 53 M. C. C. 530, 533–534; *Fleetlines, Inc.* v. *Osbourn Trucking Co.*, 54 M. C. C. 221, 230–231; *Dunn Extension-Radio Sets*, 54 M. C. C. 233, 235–236; and *Mural Trucking Service—Interpretation of Certificate*, 63 M. C. C. 47, 51.

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[4] Appellant, in its brief, (p. 42) points out that the application form signed by Nelson in 1935 requested a permit to operate as a contract carrier of store fixtures, miscellaneous merchandise and household furniture. (R. 248). But the first question answered on that application form (R. 247) indicated that Nelson was *not* engaged in transporting "commodities generally", and that the miscellaneous merchandise which he transported were "special commodities" transported for the Walgreen Co.

In *C & H Transportation Co., Inc.—Interpretation of Certificate, supra*, the Commission pointed out that, in issuing permits and certificates, it identifies commodities to be transported in three principal ways: (1) by naming the commodities specifically, (2) by generic or class terms, and (3) by reference to their intended use.

The commodities which appellant is authorized to transport are simply identified in its permit in the manner set forth in (3) above, namely, by reference to their intended use. As stated by the Commission in its report in the instant proceeding, "The important determination here, as in all such inquiries, is what transportation was intended to be authorized by this language of the permit." (R. 23) Thus, in making such determination the Commission applied the "intended use", which was the basis upon which the permit was issued.

The application of this doctrine by the Commission has been sustained in three-judge district court proceedings.

In *Dart Transit Co.—Investigation of Operations*, 54 M. C. C. 429, an investigation proceeding was instituted to determine whether the carrier was transporting various commodities, beyond the scope of its permit to transport "packing house and dairy products, equipment, material and supplies," "dairy products, equipment, supplies, and material," and "canned goods and canning factory supplies." Some of the shipments involved (pp. 438 and 439) consisted of pulpboard cartons and paper garment hangers moving from a paper products manufacturer to dry-cleaning establishment suppliers, a flour manufacturer, a flour and home appliance manufacturer, a battery manufacturer, a brewer, and a paint manufacturer; cleanser from a cleanser manufacturer to consignees not engaged in the packing house, dairy products, or canning business; wooden boxes to a soft-drink manufacturer; and glass trays from a glass manufacturer to a bottling company. In issuing a cease and desist order with respect to these commodities, which was upheld by the district court and affirmed by this Court in *Dart Transit Co.* v. *Interstate Commerce Commission, supra*, Division 5 of the Commission said (p. 440) that in order for Dart to transport such commodities they "must at the time of shipment definitely be intended for use by a packing house, dairy-products concern, or cannery."

Similarly in *Converse* v. *United States*, 109 F. Supp. 807 (N. D. Cal.), the district court upheld a cease and desist order entered by the Commission in *Pierce Auto Freight Lines, Inc.* v. *Converse,* 54 M. C. C. 447, in which the "intended use" test was applied. The certificate issued to Converse authorized it to transport, among other things, "machinery and machinery parts, mining and construction materials, equipment and supplies." The carrier transported paper bags, canned goods, and glue stock, which the Commission held to be beyond the scope of its authority, stating that in the absence of a showing upon the record that they were intended for use in connection with a mining or construction project, it must be concluded that they are not embraced in the authority set forth in the certificate.

If it had been the intention of the Commission, when it issued the permit in this case, to authorize the transportation of all articles similar to those which are stocked and sold in drug stores, without reference to the business use of the particular goods, the Commission could have described the commodities to be transported as "such general merchandise as is dealt in by" drug stores, as it has done in other proceedings. *Sanders Extension of Operations—Washington, D. C.,* 47 M. C. C. 210, 214; *J. P. Spaenhower, Modification of Certificate,* 9 Fed. Carriers Cases 247; *Anton Vidas—Contract Carrier Application,* 62 M. C. C. 106; and *Interstate Commerce Commission* v. *Ratner,* 6 Fed. Carriers Cases 2206.

The Commission, however, did not use this broad language in this instance, and therefore appellant is authorized under its permit, as issued, to transport only those commodities which are either consigned to a drug store or which are intended for eventual delivery to and sale in a drug store. None of the shipments involved meet that test.

In its brief (page 34) appellant reiterates the argument which it made before the Commission that it has undertaken to read into appellant's permit a "Keystone" restriction. The "Keystone" restriction to which the appellant refers is one which has been inserted in many permits since the Commission's decision in *Keystone Transportation Co. Contract Carrier Application,* 19 M. C. C. 475. The restriction specifies that the carrier to whom the permit is issued may enter into special and individual contracts or agreements with specified classes of shippers for the transportation of such goods as are dealt in by them. In its report in this case, however, the Commission disavowed any purpose to construe appellant's permit so as to limit the class or type of persons with whom it may contract to transport shipments (R. 239).

III

THE COMMISSION'S CEASE AND DESIST ORDER IS SUPPORTED BY ADEQUATE FINDINGS AND SUBSTANTIAL EVIDENCE

The appellant, on page 44 of its brief, states that "The Commission's report lacks findings and conclusions with respect to all material issues of fact and law, with reasons and bases therefor, as required by Section 8 (b) of the Administrative Procedure Act," and on page 46 states that the "cease and desist order is not supported by substantial evidence." On pages 45 and 46, appellant states that the order is arbitrary and capricious.

We submit that all of these contentions are wholly without foundation.

The Commission made all basic and ultimate findings required of it. The Commission painstakingly discussed each of the exceptions to the Examiner's report advanced by the appellant, and made a specific finding with respect to each.

The Commission then concluded its report with this finding (R. 240):

> We have given full consideration to respondent's exceptions and the replies thereto and find that except as modified herein the examiner has adequately stated the facts and conclusions on the issues in the report hereinafter set forth which accompanied his recommended order. With respect to that portion of the permit primarily an issue, namely, the phrase reading "*stock* in trade of drug stores", we agree with the conclusion of the examiner that to the extent respondent is transporting commodities which at the time of their movement are not, or are not intended to become, part of the stock in trade of a drug store, such operations are in excess of its authority and are in violation of section 209 of the act and should be discontinued. In the circumstances we adopt his report and findings as our own. An appropriate order requiring respondent to cease and desist from the operations found to be unauthorized will be entered.

The general principles applicable in determining the adequacy of the findings of the Commission and the sufficiency of the supporting evidence are well established. Thus, the requirements of the law are met if the Commission's findings include the ultimate ones specified by the statute and provide a rational basis for its decision, and if the findings are in turn supported by substantial evidence in the record considered as a whole. *United States* v. *Pierce Auto Freight Lines, Inc.*, 327 U. S. 515, 531–532; *Rochester Telephone Corp.* v. *United States*, 307 U. S. 125, 145-146; *Universal Camera Corp.* v. *National Labor Relations Board*, 340 U. S. 474, 490.

In any event, the courts have held, following the enactment of the Administrative Procedure Act, that Section 14 (1) of the Interstate Commerce Act (49 U. S. C. 14 (1)), which is made applicable to Part II of that act relating to motor carriers by Section 204 (d) of that act (49 U. S. C. 304 (d)), does not require specific findings of fact to be made by the Commission except in cases where damages are awarded, which is not the case here. *Alabama G. S. R. Co.* v. *United States*, 340 U. S. 216, 227–228; *Coyle Lines, Inc.* v. *United States*, 115 F. Supp. 272, 276; *Luckenbach S. S. Co.* v. *United States*, 122 F. Supp. 824, 827, affirmed *per curiam*, 347 U. S. 984.

There is substantial evidence of record to support the foregoing findings. It was established by uncontradicted testimony and exhibits that during the period from July 31, 1953, to December 7, 1953, appellant transported in interstate commerce between points covered by plaintiff's permit a total of 51 shipments of commodities from certain consignors to certain consignees. None of the consignors or consignees was a drug store. The questioned shipments consisted of (1) canned or packaged grocery items, such as canned dog food, canned hams, canned preserves and jellies, and salad dressing, consigned to grocery stores or warehouses; (2) fruit juices and dry and liquid cream to food manufacturers; (3) beer and wine to liquor distributors; (4) dry glue in bags to a manufacturer of gummed product; (5) candy to a wholesale candy distributor; (6) dry milk to a distributor thereof; and (7) automobile batteries to a general merchandise company (R. 221–226).

As the courts have repeatedly held, the function of weighing the evidence is for the Commission, and "The judicial function is exhausted when there is found to be a rational basis for the conclusions approved by the administrative body." *Mississippi Valley Barge Line Co.* v. *United States*, 292 U. S. 282, 286–287; *United States* v. *Pierce Auto Freight Lines*, 327 U. S. 515, 535.

Under these decisions, we submit that the evidence is substantial and affords a rational basis for the Commission's action, and that its order is neither arbitrary nor capricious.

IV

IF THE PERMIT, AS FAIRLY CONSTRUED, IS LESS BROAD THAN THE "GRANDFATHER" OPERATIONS, APPELLANT'S REMEDY IS TO PETITION TO REOPEN THE "GRANDFATHER" APPLICATION FOR THE INTRODUCTION OF ADDITIONAL EVIDENCE IN THAT PROCEEDING

Appellant, we submit, has been properly ordered to limit its motor carrier operations to those covered by its permit. In this proceeding, the scope of the existing permit has been reasonably construed and it has been established that appellant has recently engaged in hauling operations beyond those authorized. The Commission's order in this proceeding must, we believe, be sustained.

It is clear from the record that the permit issued in 1942 is at least as broad as that justified by Nelson's representations. In fact it is broader. Nelson at that time stated that the only stock in trade which he hauled was for the Walgreen company. The permit, based on his statements, authorized Nelson to haul the stock in trade for any drug store. Appellant cannot successfully argue that the permit issued in 1942, as now construed by the Commission, is narrower than the stated operation upon which it was based.

In this proceeding appellant has sought to make a collateral attack on the permit. Appellant states that "Nelson did not know how to go about procuring a permit and was not represented by counsel * * *" (Br. 10). Appellant argues that he was misled by a Mr. Petritz, who has since died, and that his application was incorrect in many regards (Br. 10–13). It is stated that "Nelson was actually hauling a broader range of commodities, e. g., dime store merchandise, slate, flagstone, marble, plumbing and heating supplies and fixtures, electrical equipment, and automobile bodies and transmissions" (Br. 42).

At no time has appellant made any effort to change or correct the permit that was issued in 1942. Appellant may not sit by, violating the permit that was issued, and then seek to resist an order to comply with the permit by allegations that his "grandfather" operations were actually greater than those covered by the permit. Such a collateral attack upon the proceeding on the "grandfather" application cannot be made in the present action. Cf. *Callanan Road Co.* v. *United States,* 345 U. S. 507, 512–513; *Southwest Freight Lines* v. *Interstate Commerce Commission,* 184 F. 2d 149, 151; *Riss & Company* v. *United States,* 117 F. Supp. 296, 301, affirmed, 346 U. S. 890; *Interstate Commerce Commission* v. *Consolidated Freightways,* 41 F. Supp. 651, 655.

And in no way can appellant's permit, covering "stock in trade of drug stores", be construed to cover slate, automobile bodies, or other commodities which appellant now states that Nelson was hauling before 1935.

Appellant's real grievance, if it has one, is that the permit issued to its predecessor, fairly construed, does not correctly reflect the scope of the "grandfather" operations performed. Appellant also contends that Nelson was misled and has a legitimate excuse for having failed to describe correctly his pre-1935 operations in his application for a permit. Under these circumstances the proper remedy is a petition to the Commission to reopen the "grandfather" application and to take additional evidence in that proceeding. Despite the lapse of time the Commission has been willing, where adequate grounds are shown, to reopen original "grandfather" application proceedings to consider whether the permit adequately reflects the pre-1935 operations. *E. g., George Grifall Common Carrier Application,* 62 M. C. C. 763 (1954); *Howard Sober, Inc., Modification of Certificate,* Docket No. MC–8989 (1952), 61 M. C. C. 802; *Leichtman Bros., Inc., Modification of Certificate,* Docket No. MC–77064

(1954), 62 M. C. C. 810; *Old Colony Motor Lines, Inc., Modification of Certificate*, Docket No. MC-39099 (1952), 61 M. C. C. 803. In each of these cases the proceeding on the "grandfather" application was reopened, and after hearing the Commission in each instance broadened the scope of the "grandfather" certificate.

In suggesting appellant's proper remedy we do not, of course, pass on the correctness of the assertions as to the scope of Nelson's pre-1935 operations or on the alleged justification for having stated nothing about those operations either at the time of the application or during the succeeding years.

CONCLUSION

For the foregoing reasons the judgment of the district court should be affirmed.

Respectfully submitted.

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VICTOR R. HANSEN,
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NOVEMBER 1957.

APPENDIX

STATUTES INVOLVED

Section 204 (c) of the Interstate Commerce Act, as added by the Act of August 9, 1935, 49 Stat. 543, 547, and amended by the Act of September 18, 1940, 54 Stat. 922 (49 U. S. C. 304 (c)) provides:

> Upon complaint in writing to the Commission by any person, State board, organization, or body politic, or upon its own initiative without complaint, the Commission may investigate whether any motor carrier or broker has failed to comply with any provision of this part, or with any requirement established pursuant thereto. If the Commission, after notice and hearing, finds upon any such investigation that the motor carrier or broker has failed to comply with any such provision or requirement, the Commission shall issue an appropriate order to compel the carrier or broker to comply therewith. Whenever the Commission is of opinion that any complaint does not state reasonable grounds for investigation and action on its part, it may dismiss such complaints.

Section 209 (a) (1) of the Interstate Commerce Act, as added by the Act of August 9, 1935, 49 Stat. 543, 552, and amended by the Act of June 29, 1938, 52 Stat. 1238, and by the Act of September 1, 1950, 64 Stat. 575 (49 U. S. C. 309 (a) (1)) provides in part:

> Except as otherwise provided in this section and in section 210a, no person shall engage in the business of a contract carrier by motor vehicle in interstate or foreign commerce on any public highway or within any reservation under the exclusive jurisdiction of the United States unless there is in force with respect to such carrier a permit issued by the Commission,

authorizing such person to engage in such business: *Provided*, That, subject to section 210, if any such carrier or a predecessor in interest was in bona fide operation as a contract carrier by motor vehicle on July 1, 1935, over the route or routes or within the territory for which application is made and has so operated since that time, or, if engaged in furnishing seasonal service only, was in bona fide operation on July 1, 1935, during the season ordinarily covered by its operations, except in either instance as to interruptions of service over which the applicant or its predecessor in interest had no control, the Commission shall issue such permit, without further proceedings, if application for such permit is made to the Commission as provided in paragraph (b) of this section and within one hundred and twenty days after this section shall take effect and if such carrier was registered on July 1, 1935, under any code of fair competition requiring registration, the fact of registration shall be evidence of bona fide operation to be considered in connection with the issuance of such permit. Otherwise the application for such permit shall be decided in accordance with the procedure provided for in paragraph (b) of this section and such permit shall be issued or denied accordingly. Pending determination of any such application the continuance of such operation shall be lawful. Any person, not included within the foregoing provisions of this paragraph, who or which is engaged in transportation as a contract carrier by motor vehicle when this section takes effect, may continue such operation for a period of one hundred and twenty days thereafter without a permit and, if application for such permit is made within such period, the carrier may, under such regulations as the Commission shall prescribe, continue such operation until otherwise ordered by the Commission: * * *.

Section 209 (b) of the Interstate Commerce Act, as added by the Act of August 9, 1935, 49 Stat. 543, 553, and amended by the Act of September 18, 1940, 54 Stat. 919 (49 U. S. C. 309 (b)) provides:

> Applications for such permits shall be made to the Commission in writing, be verified under oath, and shall be in such form and contain such information and be accompanied by proof of service upon such interested parties as the Commission may, by regulations, require. Subject to section 210, a permit shall be issued to any qualified applicant therefor authorizing in whole or in part the operations covered by the application, if it appears from the applications or from any hearing held thereon, that the applicant is fit, willing, and able properly to perform the service of a contract carrier by motor vehicle, and to conform to the provisions of this part and the lawful requirements, rules, and regulations of the Commission thereunder, and that the proposed operation, to the extent authorized by the permit, will be consistent with the public interest and the national transportation policy declared in this Act; otherwise such application shall be denied. The Commission shall specify in the permit the business of the contract carrier covered thereby and the scope thereof and shall attach to it, at the time of issuance, and from time to time thereafter, such reasonable terms, conditions, and limitations consistent with the character of the holder as a contract carrier as are necessary to carry out, with respect to the operations of such carrier, the requirements established by the Commission under section 204 (a) (2) and (6): *Provided, however,* That no terms, conditions, or limitations shall restrict the right of the carrier to substitute or add contracts within the scope of the permit, or to add to his or its equipment and facilities, within the scope of the permit, as the development of the business and the demands of the public may require.

Section 212 (a) of the Interstate Commerce Act, as added by the Act of August 9, 1935, 49 Stat. 543, 555, and amended by the Act of June 29, 1938, 52 Stat. 1238, and by the Act of September 18, 1940, 54 Stat. 924 (49 U. S. C. 312 (a)) provides in part:

> Certificates, permits, and licenses shall be effective from the date specified therein, and shall remain in effect until suspended or terminated as herein provided. Any such certificate, permit, or license may, upon application of the holder thereof, in the discretion of the Commission, be amended or revoked, in whole or part, or may upon complaint, or on the Commission's own initiative, after notice and hearing, be suspended, changed, or revoked, in whole or in part, for willful failure to comply with any provision of this part, or with any lawful order, rule, or regulation of the Commission promulgated thereunder, or with any term, condition, or limitation of such certificate, permit, or license: *Provided, however,* That no such certificate, permit, or license shall be revoked (except upon application of the holder) unless the holder thereof willfully fails to comply, within a reasonable time, not less than thirty days, to be fixed by the Commission, with a lawful order of the Commission, made as provided in section 204 (c), commanding obedience to the provision of this part, or to the rule or regulation of the Commission thereunder, or to the term, condition, or limitation of such certificate, permit, or license, found by the Commission to have been violated by such holder: * * *.

Administrative Procedure Act (Act of June 11, 1946, c. 324, 60 Stat. 237):

> Sec. 8 [5 U. S. C. 1007]. In cases in which a hearing is required to be conducted in conformity with section 7—

* * * * *

(b) SUBMITTALS AND DECISIONS.— * * * All decisions * * * shall become a part of the record and include a statement of (1) findings and conclusions, as well as the reasons or basis therefor, upon all the material issues of fact, law, or discretion presented on the record * * *

SEC. 10 [5 U. S. C. 1009] * * *

* * * * *

(e) SCOPE OF REVIEW.—So far as necessary to decision and where presented the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of any agency action. It shall * * * (B) hold unlawful and set aside agency action, findings, and conclusions found to be (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) contrary to constitutional right, power, privilege, or immunity; (3) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (4) without observance of procedure required by law; (5) unsupported by substantial evidence in any case subject to the requirements of sections 7 and 8 or otherwise reviewed on the record of an agency hearing provided by statute; or (6) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court. In making the foregoing determinations the court shall review the whole record or such portions thereof as may be cited by any party, and due account shall be taken of the rule of prejudicial error.

U. S. GOVERNMENT PRINTING OFFICE: 1967

No. 16

IN THE

Supreme Court of the United States

October Term, 1957.

ANDREW G. NELSON, INC.,
Appellant,

vs.

UNITED STATES OF AMERICA, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS.

REPLY BRIEF FOR APPELLANT.

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1957.

No. 16

ANDREW G. NELSON, INC.,
Appellant,

vs.

UNITED STATES OF AMERICA, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS.

REPLY BRIEF FOR APPELLANT.

I.

UNDER THE GUISE OF INTERPRETATION, THE COMMISSION HAS DEPRIVED APPELLANT OF OPERATING RIGHTS GUARANTIED BY THE GRANDFATHER CLAUSE OF PART II OF THE INTERSTATE COMMERCE ACT.

The Government argues that the only issue in this case is the correct construction of the permit issued to appellant's predecessor (Nelson) in 1942 and that its interpretation deprives appellant of no rights since it only declares what those rights were "from the beginning." (Br. 7, 11.) This argument ignores the basic difference between the operating rights Nelson acquired primarily under the grandfather clause of Part II of the Interstate Commerce Act, and only secondarily under the 1942 permit, which was required by statute to reflect those rights.

A. The Commission erred in refusing to consider evidence of Nelson's grandfather operations.

Section 209(a) of the Act commanded the Commission to issue to grandfather carriers permits granting substantial parity between past and prospective operations "without further proceedings." (Govt. Br., Appendix, 34.) *Alton R. Co.* v. *United States*, 315 U.S. 15 (1942). The statute then clearly distinguished grandfather carriers from new applicants by providing: "Otherwise the application * * * shall be decided in accordance with the procedure provided for in paragraph (b) * * *." (Govt. Br., Appendix, 34.)

Section 209(b) required new applicants to satisfy the Commission, *inter alia*, that their proposed operations would be consistent with the public interest and the national transportation policy. (Govt. Br., Appendix, 35.)

Therefore, while the Commission had considerable discretion in granting or denying permits to new applicants and in defining the scope of operations authorized by such permits, it had no discretion in dealing with grandfather carriers; once the scope of their operations was established, their permits were required to mirror those operations. *United States* v. *Maher*, 307 U.S. 148, 153 (1939); *United States* v. *Carolina Carriers Corp.*, 315 U.S. 475, 488 (1942); *Keystone Transp. Co. Contract Carrier Application*, 19 M.C.C. 475, 499 (1939) (concurring opinion). For the purposes of this case, it is most important to bear in mind that a grandfather carrier is entitled to continue the same operations regardless of whether or not the language of his permit was aptly chosen to describe those operations. As the court said in *Seatrain Lines* v. *United States*, 64 F. Supp. 156, 161 (Dela. 1946), affirmed, 329 U.S. 324 (1947):

> The phraseology of the certificate cannot serve, of course, to impair Seatrain's rights under the grandfather clause * * *.

Therefore, although the Commission is free to interpret a certificate or permit granted to a new applicant, subject only to the rule that its interpretation may not be clearly erroneous, its duty does not stop there when a grandfather carrier's permit is involved.[1] In such a case, even if the Commission's interpretation of the permit's language is correct, as a matter of semantics, it cannot order the grandfather carrier to cease operations which may violate the permit, as interpreted, but which are nevertheless within the scope of the grandfather operations which the permit was required to reflect. *Bison Freight Lines* v. *Northwest Dispatch Inc.*, 60 M.C.C. 505, 506 (1954). However, in this case, the Commission disregarded the fact that the primary source of appellant's rights was the grandfather clause, not the Commission's largess, and openly refused to consider any events prior to the issuance of the 1942 permit on the ground that the permit contained no patent ambiguity[2] (R. 237), despite the fact that both appellant and the Bureau of Inquiry and Compliance introduced considerable evidence of such events (Appellant's Br. 8-9).

We are aware of only two other cases in which the Commission refused to consider evidence of grandfather operations which the carrier claimed would show that the operations in question were authorized regardless of the Commission's current interpretation of his permit or certificate; and in both cases the Commission's orders were set aside by three-judge district courts. In *Bird Trucking Co. Modification of Certificate*, 53 M.C.C. 703 (1952), a grandfather carrier's successor sought to have the commodity authorization in its certificate enlarged from "groceries" to commodities dealt in by wholesale and retail grocery houses. (After the certificate had been issued, the Commission began defining "groceries" to mean only edibles, except fresh meat.) In support of his position, the carrier introduced proof of the underlying grandfather operations to show that a variety of non-edible commodities commonly sold in grocery stores had been transported. The Commission held that the evidence was not sufficiently definite to authorize the requested modification except with respect to dog food, household washing and cleaning supplies, and household paper products. However, the district court remanded because of the Commission's failure to give adequate consideration to *all* of the grandfather evidence offered. *Bird Trucking Co.* v. *United States*, 11 Federal Carriers Cases, par. 81,028 (W.D. Wis. Sept. 26, 1955). The court agreed that the interpretation of the language of a certificate is normally for the Commission to determine and that its determination should not be overturned unless clearly erroneous—and for these reasons agreed that the Commission's interpretation of "groceries" to mean edibles only was correct. Nevertheless, the court held that this definition could not be applied to a certificate issued before it was adopted and at a time when the grandfather carrier had a right to assume that "groceries" fairly comprehended all of the non-edibles he had been transporting during the grandfather period.

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[1] *Willers* v. *United States*, 123 F. Supp. 270 (D.S.D. 1955); upon which the Government so heavily relies (Br. 13), involved a permit issued to a new applicant, not to a grandfather carrier.

[2] As we pointed out in our brief (p. 37, note 29), the Commission is never reluctant to find sufficient ambiguity to warrant examination of grandfather evidence which sustains its position.

Similarly, in *Johnson Truck Service* v. *Salvino*, 61 M.C.C. 329 (1952), the Commission ordered a grandfather carrier to cease transporting "factory materials" under a permit which authorized the transportation only of "factory supplies." (The Commission, subsequent to the issuance of the permit, began to draw a distinction between commodities which are used in operating a factory (supplies) and those which are used as components of the manufactured product (materials).). However, the district court remanded because of the Commission's failure to consider grandfather evidence. *Salvino* v. *United States*, 119 F. Supp. 277 (W.D. Wash. 1954). The Commission made the same argument that it makes here, viz.: that it had only interpreted the language of one of its permits and that its interpretations are not to be disturbed unless clearly erroneous. The court agreed with these truisms but held that the real issue was not the abstract meaning of the word "supplies", as a matter of semantics, but the meaning of that word as used in Salvino's permit, and that the Commission's interpretation could not stand if it violated a right granted to him by the Interstate Commerce Act. Id. at 281-282. The Commission also argued that consideration of grandfather evidence was unnecessary because the permit was unambiguous, but the court held that the language of the permit was ambiguous when considered in the light of the circumstances under which it was issued. Id. at 283-284.

The Government attempts to distinguish the *Bird* and *Salvino* cases on the ground that, in each case, both parties contended that the commodity description was ambiguous and presented conflicting evidence in support of their divergent interpretations.[3] (Br. 14.) The Government also points out that, in the *Salvino* case, the Commission had decided the case on a theory different from that on which it had been tried, by stipulation, thus denying the opportunity to present appropriate evidence. However, these grounds do not distinguish the *Bird* and *Salvino* cases for the purposes for which they have been cited by appellant, viz.: to show that the Commission has no right to deprive a grandfather carrier of his statutory rights by pretending to interpret the language of his permit, while refusing to consider evidence of the underlying grandfather operations.

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[3] The opinions do not support this statement. So far as the Commission's opinion in the *Bird* case shows, only the grandfather carrier's successor introduced grandfather evidence. In the *Salvino* case, Salvino, before the hearing examiner, took the position that his permit was unambiguous and that there was no occasion to consider evidence of events underlying the issuance of the permit; he introduced such evidence only to rebut evidence introduced by the complainants. *Salvino* v. *United States*, 119 F. Supp. 277, 282-283, (W.D. Wash. 1954).

B. Appellant is not estopped to complain of the Commission's failure to consider evidence of Nelson's grandfather operations.

The Government argues that appellant is estopped to complain of the Commission's failure to consider evidence of Nelson's grandfather operations because its counsel, before the hearing examiner, took the position that its permit was unambiguous and that evidence of underlying events could not therefore be considered. (Br. 15-16.)

Appellant's position before the hearing examiner, as well as before this Court, has always been that its permit is clear and unambiguous and that, properly interpreted, it authorizes the transportation in question; however, if it should be held ambiguous or if the Commission's intended use interpretation of the language of the permit should be sustained, the Commission must consider the underlying grandfather evidence either to resolve the ambiguity or to show that its interpretation deprives appellant of grandfather rights. (R. 50-52, 114-116; Appellant's Br. 37.) The Government's extract of appellant's counsel's statements before the hearing examiner is not complete and is taken out of context. (Br. 15-16.)

It should be noted that all of the cases cited by the Government to support its estoppel argument involved situations where the points sought to be raised before the reviewing courts had never been presented to or passed on by the Commission. Here, appellant complained of the hearing examiner's failure to consider all of the underlying grandfather evidence in its first and fourth exceptions to the examiner's report, but the Commission overruled those exceptions. (R. 235, 237.)

If there is any estoppel in this case, it should be applied against the Commission. Before the hearing examiner the Commission's Bureau of Inquiry and Compliance, armed with certain documents carefully selected from the record in the grandfather proceeding to support its restrictive interpretation of the permit, took the position that the permit was ambiguous; however, after the hearing, during which Nelson uncontrovertedly testified as to the true scope of his grandfather operations, the Bureau switched its position and claimed that such evidence could not be considered because the permit was unambiguous. (See Appellant's Br. 39.)

C. The grandfather evidence which the Commission refused to consider unequivocally shows that the Commission has deprived appellant of vested grandfather rights.

The Government argues that, if the phrase "*stock* in trade of drug stores" in appellant's permit is ambiguous, the ambiguity should be resolved only by considering the documentary evidence which was before the Commission when it was issued.[4] (Br. 17-18, 19-22.)

This argument, like the rest, assumes that the only question in this case is the construction of the 1942 permit, whereas we believe it is clear that grandfather evidence must be considered not only as an aid to construction, but also to determine whether or not the Commission's construction deprives appellant of his statutory grandfather rights. For the latter purpose, the Commission must necessarily consider not only the documentary evidence before it in the grandfather proceeding, but all available evidence of the true scope of Nelson's grandfather operations.

However, even if the only question here were the interpretation of the 1942 permit, it would be improper to consider only the documentary evidence before the Commission when the permit was issued because of Nelson's uncontroverted explanation of why that evidence did not accurately reflect the true scope of his operations. (Appellant's Br. 10-13.) To summarize: It is true, as the Government states (Br. 10-13) and as we conceded (Br. 10-11), that the documentary evidence (except the N.R.A. Certificate of Registration which described Nelson as an "ANYWHERE FOR HIRE Member of the Trucking Industry"[5] (R. 229)) indicates that Nelson was transporting merchandise only for Walgreen Drug Stores during the grandfather period. However, as Nelson explained, this was because the Commission's District Supervisor, Petritz, told Nelson that it was necessary, in order to get the kind of permit he wanted, i.e. a contract carrier permit to transport store fixtures, miscellaneous merchandise,[6] and household furniture, to show only *one* contract and that, after the permit was granted, he could substitute any number of contracts with different persons. Appellant does not claim that Nelson was misled by Petritz, as the Government states (Br. 30), but that Petritz properly advised Nelson according to the law as it was then understood by the Commission itself. In *Longshore Contract Carrier Application*, 2 M.C.C. 480, 481 (1937), the Commission stated:

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[4] It must be remembered that the Commission refused to consider *any* of the events prior to the issuance of the 1942 permit. (R. 237.) Its present argument that some, but not all, of those events should be considered to resolve any ambiguity is inconsistent with its holding.

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[5] N.R.A. registration was required to be considered as evidence of bona fide operation in connection with the issuance of the grandfather permit. Interstate Commerce Act, Part II, Sec. 209(a). It is significant that the Bureau of Inquiry and Compliance did not include Nelson's N.R.A. certificate in the group of carefully selected exhibits which it introduced to support its position before the hearing examiner. (I.C.C. Ex. 1; R. 53, 215-220.)

[6] The Government points out that Nelson's application showed that the miscellaneous merchandise he had been transporting was for the Walgreen Company and that these were classified as "special commodities", not "commodities generally". (Br. 22, note 4.) Perhaps this is why the Commission found, in its 1938 compliance order, that Nelson had been transporting "commodities indicated" as, *inter alia*, "*stock* in trade of drug stores". (I.C.C. Ex. 5; R. 215, 230-231.) If so, "*stock*" must have been intended to mean the same as "miscellaneous merchandise" and "in trade of drug stores" was intended only to indicate the difference between "commodities generally" and "special commodities". It is significant that such a special commodity description carries its own inherent limitations, unlike the extremely broad commodity descriptions, such as "contractors' materials, supplies, and equipment", "farm supplies", "doctor's, dentist's, and hospital supplies and equipment", etc., upon which the Commission has successfully imposed an implied intended use limitation (Appellant's Br. 26, note 20) and upon which precedents the Government relies (Br. 24-25).

> Under section 209(b) of the Motor Carrier Act, 1935, we are without authority to attach any terms, conditions, or limitations to a permit of a contract carrier which would restrict the right of the carrier to substitute or add contracts within the scope of the permit.

It was not until *Keystone Transp. Co. Contract Carrier Application*, 19 M.C.C. 475 (1939), that the Commission abandoned this construction and developed the technique of limiting broad commodity descriptions by imposing restrictions as to the particular shippers or class of shippers for whom the commodities described could be transported. See Commissioner Lee's dissent in the *Keystone* case, at p. 501, where he points out that "the majority, for the first time, departs from our well-established policy."

Nelson's explanation is further corroborated by the fact that, after his application was submitted, the Commission's agents inspected his business and were shown a large number of delivery tickets indicating the transportation of a variety of commodities for many shippers other than drug store owners.[7] Therefore, Petritz must have been aware of the full scope of Nelson's grandfather operations, but chose to reflect only the Walgreen carriage because of his understanding that it was necessary to show only one contract to qualify Nelson for a contract carrier's permit.

Under these circumstances, it would be a gross distortion to consider only the documentary evidence before the Commission in the grandfather proceeding either as an aid to the interpretation of Appellant's permit or as conclusive of the scope of Nelson's grandfather operations.

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[7] The Government, somewhat misleadingly, states (Br. 3): "No receipts indicating any other carriage [except for Walgreen] were submitted."

It is significant that the Government does not challenge Nelson's testimony as to the true scope of his grandfather operations. (See Appellant's Br. 9-10.) The Government's only argument is that such evidence should not be considered because (1) appellant, before the hearing examiner, took the position that the permit was unambiguous and (2) it was not reflected in the documentary evidence before the Commission when the permit was issued. Both of these objections have been shown to be without merit. The uncontroverted evidence shows that Nelson's grandfather business was not confined to the transportation of commodities which, at the time of their movement, were (or were intended to become) part of the stock in trade of a drug store, as the Commission now interprets appellant's permit. (R. 240.) And it is clear that the guaranty of the grandfather clause applies to the business in which the carrier was engaged—and not to particular operations under individual contracts. (Appellant's Br. 40-41.)

It cannot be doubted that the Commission's restrictive interpretation deprives appellant of the right to continue the kind of business which its predecessor was conducting during the grandfather period, in violation of the grandfather clause (Section 209(a)) of Part II of the Interstate Commerce Act.

II.

UNDER THE GUISE OF INTERPRETATION, THE COMMISSION HAS MODIFIED APPELLANT'S PERMIT IN VIOLATION OF SECTION 212(a) OF PART II OF THE INTERSTATE COMMERCE ACT.

The Government argues that its interpretation of the plain and unambiguous language, "*stock* in trade of drug stores," by applying the so-called intended use test, is reasonable and consistent with past decisions. (Br. 18-19, 22-26.) The Government further argues that, inasmuch as such interpretation merely determines what rights appellant and its predecessor had "from the beginning," its action does not constitute a modification of the permit. (Br. 11-14.)

This argument, again, assumes that appellant either has no grandfather rights or that they are immaterial—an absurd position. Nevertheless, even if the only question in the case were one of construing the language of appellant's permit, we submit that the Commission's interpretation, by applying the intended use test, is clearly erroneous and effects an unauthorized modification of its operating authority just as surely as if the Commission had altered the commodity authorization to read: "*stock* in trade of drug stores, but only when part of (or intended to become part of) the stock in trade of a drug store."

A. The Commission's interpretation of "*stock* in trade of drug stores", by applying the intended use test, is clearly erroneous.

The largest section of our brief (pp. 23-36) was devoted to showing that (1) the intended use test, as a restrictive interpretive device, was unknown when appellant's predecessor's permit was issued in 1942, and (2) the intended use test cannot properly be applied in interpreting a commodity description by reference to place of *sale*, as distinguished from place or business of *use*. The Government has refused to discuss these arguments seriously and attempts to dismiss them summarily as "an extended discourse." (Br. 13.)

(1) Apparently, the Government's only answer to our argument that the intended use test was unknown as a restrictive interpretive device when the 1942 permit was issued is to state, without citation of authority, that the permit was issued on the basis of "intended use" (Br. 23) and to quote a self-serving statement from one of its 1954

decisions to the effect that commodities have been described by reference to their intended future use since the beginning of motor carrier regulation (Br. 22-23). We had thought that our brief showed clearly that this statement, if intended to be authority for the application of the intended use test, as a restrictive interpretive device, was clearly erroneous. (Br. 24-27.) The Government has not deigned to reply to our analysis. In fact, the earliest application of the intended use test cited by the Government is in a 1951 case (*Crouch—Modification of Certificate*, 53 M.C.C. 436) (Br. 23), whereas we traced the test back to a 1949 case (*England Transp. Co., Inc., Extension—Mississippi Points*, 49 M.C.C. 567) (Br. 25).

We can only conclude that the Commission has no authority that "intended use" was known and understood as an implied limitation on commodity descriptions when Nelson's permit was issued in 1942. *Salvino* v. *United States*, 119 F. Supp. 277 (W. D. Wash. 1954) and *Bird Trucking Co.* v. *United States*, 11 Federal Carriers Cases, par. 81,028 (W.D. Wis. Sept. 26, 1955), discussed in detail, above, are persuasive authority that the Commission cannot restrictively interpret a permit or certificate in the light of refinements of definition or interpretation subsequently adopted.

(2) Apparently, the Government's only reply to our argument that the intended *use* test cannot be properly applied to a commodity description by reference to place of *sale* is to state that, if the Commission had intended to authorize the transportation of such commodities as are stocked and sold in drug stores, without requiring that they be earmarked to become part of the stock in trade of a drug store, it would have used the commodity description "'such merchandise as is dealt in by' drug stores"[*] instead of "*stock* in trade of drug stores." (Br. 25.)

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[*] The Government's brief gives the impression that "such merchandise as is dealt in by *drug stores*" is a common and well understood commodity description. (Br. 25; italics supplied.) However, we know of no case in which such a commodity description was used.

We had thought that our brief conclusively showed that the Commission which issued appellant's permit considered "stock in trade of" synonymous with "such merchandise as is dealt in by" (Br. 31-33), and the Government does not attempt to refute our analysis. Moreover, it is astounding to find the Commission now taking the pious position that a "such merchandise as is dealt in by" commodity description is clearly a generic commodity description, containing no inherent intended use limitation! (Br. 25.) It was not long ago that the Commission sought to impose an intended use limitation on just such a commodity description. In *Interstate Commerce Commission* v. *Ratner*, 6 Federal Carriers Cases, par. 80,415 (N.D. Ill., April 15, 1947), the court refused to grant the Commission's request for an injunction against the transportation of beer and beer containers from a brewery to a distributor where the commodities authorized in the permit were "*such merchandise* as is dealt in by wholesale food business houses, and * * * *equipment*, *materials* and *supplies* used in the conduct of such business," because the court found that wholesale food business houses dealt in beer. Apparently the *Ratner* case taught the Commission a lesson, for it has since been careful not to attempt to imply intended use limitations in similar commodity authorizations. *Sanders Extension of Operations—Washington, D.C.*, 47 M.C.C. 210 (1947); *Vidas Contract Carrier Application*, 62 M.C.C. 106 (1953); *Archie's Motor Freight, Inc.—Interpretation of Certificate* (Docket No. MC-116008 (Sub. No. 1), decided October 3, 1957). Although the Commission was singularly unsuccessful in limiting, by interpretation, "such merchandise as is dealt in by" commodity descriptions, it is now trying to accomplish the same thing in "stock in trade of" commodity descriptions.

The Commission itself has indicated that the only appropriate limitation on a description of commodities by reference to the places where they are dealt in is a *Keystone* restriction, not an intended use limitation. *Dart Transit Co.—Modification of Permit*, 49 M.C.C. 607, 612 (1949).

The Commission which issued Appellant's predecessor's permit in 1942 was well aware of the necessity for carefully delimiting the scope of grandfather permits and was also well aware of the possibilities of using a *Keystone* restriction to limit the scope of such broad generic commodity descriptions as appellant's—and yet no such limitation was imposed and none may be implied.[9] *Keystone Transp. Co. Contract Carrier Application*, 19 M.C.C. 475, 499 (1939); *Vidas Contract Carrier Application*, 62 M.C.C. 106, 107 (1953).

B. The Commission has attempted to accomplish by interpretation what it could not accomplish under Section 212(a) of Part II of the Interstate Commerce Act.

Under Section 212(a) of the Interstate Commerce Act, a permit can be suspended, changed, or revoked, in whole or in part, after notice and hearing, only for wilful failure to comply with the statute, with one of the Commission's orders or regulations, or with any term, condition, or limitation of the permit. (Appellant's Br. 3.) The Commission itself has held that to read into a certificate (or permit, as in this case) a limitation which was not inherent in the language when the certificate was originally granted would clearly constitute modification or partial revocation, by interpretation, in violation of Section 212(a). *Coastal Tank Lines, Inc. v. Charlton Bros. Transp. Co., Inc.*, 48 M.C.C. 289, 302 (1948). The Government tries to distinguish *United States v. Seatrain Lines*, 329 U.S. 424 (1947), on the ground that it involved an attempt by the Commission expressly to modify a *water common carrier's* certificate. (Br. 14.) Nevertheless, in the course of the opinion, this Court pointed out that *motor carrier certificates* can be revoked or modified only for one of the reasons specifically enumerated in Section 212(a), and if the *Seatrain* case means anything it must stand for the proposition that the Commission cannot accomplish covertly, by interpretation, what it could not accomplish overtly under Section 212(a).

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[9] The Government accuses us of arguing that the Commission has read-into appellant's permit a *Keystone* restriction. (Br. 26.) However, appellant merely accuses the Commission of trying to accomplish the practical equivalent of a *Keystone* limitation by misapplying the intended use test. (Br. 34, particularly note 27.)

The only question, then, is whether or not the Commission's intended use interpretation of "*stock* in trade of drug stores" limits the scope of the transportation authorized by that phrase when Nelson's permit was issued in 1942.

That the superimposition of the intended use test on what would appear to be nothing more than a plain generic commodity description in fact alters the meaning of that commodity description is well illustrated by the Government's statement of the meaning of "*Stock* in trade of drug stores" (Br. 6):

> The Interstate Commerce Commission has construed that permit as *not* allowing appellant to transport such commodities as dried glue *for a manufacturer of gummed products* and automobile batteries *for department stores.*[10] (Italics supplied, in part.)

Surely it must be clear that t[illegible] Commission has added something to a simple generic description of commodities when it circumscribes the consignors or consignees for whom such commodities may be transported. (Incidentally, the quoted statement also illustrates how closely the Commission's intended use limitation approximates a *Keystone* restriction.)

We believe we have shown—and the Government has not refuted—that the intended use limitation, as now applied by the Commission, could not have been inherent in the phrase "*stock* in trade of drug stores" when Nelson's permit was issued in 1942 because (1) the intended use test, as an interpretative device, was unknown to the Commission and (2) even if it had been in existence, it would not have been applied to a commodity description by reference to place of sale, such as that contained in appellant's permit. The Commission's present attempt to read-in an intended use limitation constitutes an attempted modification of the permit, in violation of Section 212 (a), just as surely as if it had arbitrarily reopened the grandfather proceeding and changed the wording of the permit itself to read: "*stock* in trade of drug stores, but only when part of (or intended to become part of) the stock in trade of a drug store." Such subterfuge cannot be countenanced.

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[10] The Government has stated its interpretation of "*stock* in trade of drug stores" in such a way as to give the impression that the only commodities in question are dried glue and automobile batteries which, at first blush, might appear to be clearly not included in the commodity description. Of course, other commodities, which everyone would agree are commonly stocked for sale by drug stores, were involved. (Appellant's Br. 7.) Moreover, the Commission has never questioned that any of the commodities involved, including dry glue and automobile batteries, were part of the stock in trade of drug stores (R. 241-242); indeed, no such position could be maintained under the evidence presented to the Commission (Appellant's Br. 7, note 3).

III.

APPELLANT'S DEFENSE OF THE COMMISSION'S EFFORTS TO CURTAIL ITS OPERATIONS DOES NOT CONSTITUTE A COLLATERAL ATTACK ON THE PROCEEDINGS IN WHICH ITS PERMIT WAS ISSUED.

The Government has tried to place appellant in the impossible position of claiming that the phrase "*stock* in trade of drug stores" in its permit covers all of the varied commodities transported by Andrew G. Nelson during the grandfather period. (Br. 10, 17, 31.) From this it argues that appellant's only remedy is to petition the Commission to reopen the grandfather proceedings to admit additional evidence and to issue a revised permit in accordance with that evidence. (Br. 31.)

Appellant has never taken such an extreme position, but has merely argued that, if its permit is not interpreted to permit the transportation of such commodities as are customarily held for sale by drug stores, regardless of consignor, consignee, or ultimate destination,[11] the permit is not as broad as it was required to be by the grandfather clause and, consequently, the Commission was under a duty to reopen the grandfather proceedings and make the permit read as it should. (Br. 40, 43.) In addition, the Commission seems to forget that this is not a case in which appellant was the moving party and, therefore, should bear the risk of selecting the proper remedy. In this case, the Commission undertook to establish that appellant had been conducting unauthorized operations and sought to enjoin that activity. Appellant had no choice but to defend the Commission's action—and its only defenses could have been that the operations in question (1) were authorized by the unambiguous language of its permit or, in any event, (2) could not be enjoined because they were protected by the grandfather clause.

Fortunately, there is a precedent for appellant's position. In *Johnson Truck Service* v. *Salvino*, 61 M.C.C. 329 (1952), the Commission entered a cease and desist order against the carrier's claim that the operations in question were no broader than his grandfather operations. In *Salvino* v. *United States*, 119 F. Supp. 277 (W.D. Wash. 1954), the Court remanded the case to the Commission for consideration of the grandfather evidence and in *Johnson Truck Service* v. *Salvino*, 63 M.C.C. 1 (1954), the Commission, pursuant to the remand, of its own volition, reopened the grandfather clause proceeding and sustained the carrier's contention by issuing a revised permit to authorize the questioned transportation. We find it somewhat incredible that the Commission takes the position that a defendant in proceedings before the Commission challenging the propriety of his operations should be required to petition for a reopening of the grandfather proceedings rather than to defend the Commission's action.

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[11] The Government distorts appellant's position when it states:

> * * * appellant argues that his permit allows him to transport dry glue to a manufacturer of gummed products on the theory that *some* drug stores sell glue. (Br. 19, Italics supplied.)
>
> The language [of applicant's permit] on its face lends no support to appellant's position that it may transport anything to anybody so long as an item similar to that transported *might* be sold in a drug store. (Br. 8, Italics supplied.)

Appellant has never taken such an extreme position; its position was clearly stated in its brief (p. 42):

> Under the commodity description "*stock* in trade of drug stores", as appellant interprets it, only such commodities as are customarily held for sale to customers by drug stores may be transported * * *.

Appellant's defense in no way constitutes a collateral attack on the permit granted as a result of the grandfather proceedings. Appellant is perfectly content to operate under the permit as issued, so long as it is construed (1) in the light of circumstances and interpretative techniques which were known at the time it was issued and (2) in accordance with the evidence of its predecessor's grandfather operations. None of the cases referred to by the Commission in support of its collateral attack argument are applicable to the situation presented in this case. (Br. 31.) However, *Bird Trucking Co.* v. *United States*, 11 Federal Carriers Cases, par. 81,028 (W.D. Wis. Sept. 26, 1955) is in point. There, as here, the Commission argued that the carrier's position constituted a collateral attack on the grandfather proceedings, but the court held that there was no reason why the original certificate holder or his successors should have objected to the wording of the original certificate because they could not have known that the Commission would later adopt a restrictive definition of the term "groceries" and attempt to attack the successor's operations on the basis of that interpretation. The same reasoning applies in this case: after 1935, Nelson was hauling primarily for Walgreen (R. 154) and there was no reason why he should have objected to a permit which allowed him to haul stock in trade of drug stores, rather than the wide variety of commodities he had hauled during the grandfather period, so long as it was his understanding that he could transport stock in trade of drug stores without limitation as to consignor, consignee or ultimate destination.

IV.

IF APPELLANT'S VIEW OF THE REAL ISSUES BEFORE THE COMMISSION IS CORRECT, ITS ORDER IS NOT SUPPORTED BY ADEQUATE FINDINGS OR SUBSTANTIAL EVIDENCE.

The Government's argument that the Commission's order is supported by adequate findings and substantial evidence (Br. 26-29) fails to meet appellant's argument that it lacks such findings and evidence to support them because of the failure of the Commission to consider the evidence of Nelson's grandfather operations (Br. 44, 46-47). If appellant is correct in its argument that the Commission should have considered the grandfather evidence, either as an aid to interpretation or to show that the permit, as now interpreted by the Commission, is less broad than the grandfather clause guaranties, it must follow that the Commission's report lacks essential findings and its order is not supported by substantial evidence.

CONCLUSION.

The Government's brief does little more than rely upon the presumption of the correctness of its own administrative decision,[12] without discussing the real issues in this case as posed in appellant's brief. This omission is rather unfortunate because this case does involve substantial questions as to the scope of the Commission's power to effectuate its current policies under the guise of interpretation and to restrict the rights of grandfather carriers contrary to the guaranty of the grandfather clause of

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[12] We should like to call the court's attention, once again, to the unusual procedure adopted by the Commission in attacking appellant's operations which now enables it to claim the benefit of the presumption of administrative correctness. (Appellant's Br. 45-46.)

Part II of the Interstate Commerce Act. We do not know why the Government has refused to meet these issues; nevertheless, we believe that they have been discussed in our briefs sufficiently to enable this Court to give them the consideration which they deserve.

We submit that the Commission's action in this case has violated appellant's rights both under its permit and under the grandfather clause of the Interstate Commerce Act and that the Commission should not be allowed to pull itself up by its bootstraps by relying on the presumption of administrative correctness in a procedure which it deliberately engineered for that purpose.

The Commission's cease and desist order should be held unlawful and set aside.

Respectfully submitted,

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December, 1957

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No. 16

In The

Supreme Court of the United States

October Term, 1957.

ANDREW G. NELSON, INC.,
Appellant,

v.

UNITED STATES OF AMERICA, ET AL.

On Appeal From the United States District Court
For the Northern District of Illinois.

Petition for Rehearing

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957.

ANDREW G. NELSON, INC.,
Appellant,

v.

UNITED STATES OF AMERICA, ET AL.

On Appeal From the United States District Court
For the Northern District of Illinois.

Petition for Rehearing

This Court's March 3, 1958 opinion in this case makes it apparent that the crucial question—the one on which the decision of the case turns—is whether or not the commodity description "*stock* in trade of drug stores" means the same thing as "goods such as are sold in drug stores." If so, upon the authority of *Interstate Commerce Commission* v. *Ratner*, 6 Federal Carriers Cases, par. 80,415 (N.D. Ill., April 15, 1947), *Sanders Extension of Operations—Washington, D. C.*, 47 M.C.C. 210 (1947), and *Vidas Contract Carrier Application*, 62 M.C.C. 106 (1953), the phrase "*stock* in trade of drug stores" is nothing more than a generic commodity description by reference to place of sale, and the Commission's decision is clearly erroneous; if not, by analogy to such commodity descriptions as "contractors' equipment and supplies" and "packing house supplies" and upon the authority of *C & H Transp. Co., Inc., Interpretation of Certificate*, 62 M.C.C. 586 (1954) and *Dart Transit Co.—Modification of Permit*, 49 M.C.C. 607 (1949), the Commission was correct in holding that the phrase "*stock* in trade of drug stores" constitutes a restrictive commodity description by reference to intended use.[1]

The Court concluded that "*stock* in trade of drug stores" is not the same as "goods such as are sold in drug stores" for essentially two reasons: (1) "*stock* in trade of drug stores," taken in its ordinary sense, connotes possession and really means the same as "drug stores' stock"—an interpretation which is bolstered in this case by the fact that the record before the Commission when the permit was granted showed that Nelson was "hauling Walgreen's drugstore stock, and not goods such as might be stocked for sale by Walgreen;" and (2) the Commission has consistently used the phrase "such as," or a close variation thereof, when it intended a generic commodity description by reference to place of sale, but there is no such phrase in appellant's permit.

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[1] We believe the Commission achieved an unwarranted extension of its interpretive powers in the **C. & H. Transp. Co.** and **Dart Transit Co.** cases and would like to call the Court's attention to the discussion of this subject on pages 23-29 of appellant's brief. However, since, in its opinion, the Court has impliedly approved of those cases, we do not attempt to reargue the point here.

The sole reason for this petition for rehearing is that we believe it can be conclusively demonstrated, by careful examination of the evolution of the Commission's commodity description techniques, that these are not valid reasons for concluding that "*stock* in trade of drug stores" was intended to mean something different than "goods such as are sold in drug stores," but that, on the contrary, the Commission which granted Nelson's permit must have intended these phrases to mean the same thing. As it presently stands, this Court's opinion is founded upon an erroneous view of the historical setting in which appellant's permit was granted, and we are fearful that this error might be due to a failure on our part to make a sufficiently clear exposition of the historical background.

Everyone agrees that the important thing is what was intended to be authorized by the language of appellant's permit—and the key to what was intended is to be found in a careful analysis and comparison of the way in which the Commission dealt with the grandfather applications of approximately 600 A & P contract carriers and Andrew G. Nelson in the early days of motor carrier regulation.[2]

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[2] The history of the A&P contract carriers and the problems which the Commission encountered in bringing them under regulation are discussed in two cases involving A&P contract carriers: **Keystone Transp. Co. Contract Carrier Application,** 19 M.C.C. 475 (1939) and **McAteer Contract Carrier Application,** 42 M.C.C. 35 (1943). Inasmuch as frequent citation of these cases will be necessary, they will often be referred to simply as the **Keystone** and **McAteer** cases, without full citation.

STATEMENT

Applications of the A & P Contract Carriers

During the early 1930's, the Great Atlantic and Pacific Tea Company developed a transportation system in which air, water, rail, and motor *common* carriers were used for long hauls and motor *contract* carriers were used for short hauls. *McAteer* at 39. The motor contract carriers hauled only for A & P and were required to transport anything their equipment could handle, wherever and whenever directed by A & P; consequently, they transported a wide variety of commodities between A & P's independent suppliers (where shipment was f.o.b. origin), manufacturing subsidiaries, warehouses, and retail stores. *McAteer* at 39-40; *Keystone* at 498.

After the Motor Carrier Act was passed, in 1935, approximately 600 A & P contract carriers, with the help of the Company, filed applications for motor contract carrier permits under the grandfather clause of the Act. *Keystone* at 482. Conferences were held between the applicants, the Company, and the Commission's Bureau of Motor Carriers and considerable thought was given as to the scope of the operating rights to which the A & P contract carriers were entitled. *Keystone* at 482. Finally, on January 5, 1937, the Commission issued a compliance order[3] to Thomas Jones, one of the A & P contract carriers. *Keystone* at 482. The applicant and the Company made certain objections to the compliance order and on

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[3] A compliance order typically embodied a finding as to the scope of the applicant's operations during the crucial grandfather period and directed the issuance of a permit in accordance with that finding upon the applicant's complying with certain formalities.

November 29, 1937, the Commission amended the compliance order so as to authorize the issuance of a permit to transport the following commodities (*Keystone* at 483):

> Such merchandise as is dealt in by wholesale, retail, and chain grocery and food business houses, and in connection therewith, equipment, materials, and supplies used in the conduct of such business
> * * *.

The applicant and the Company at first made some objections to this amended compliance order, but later accepted it and it became final. *Keystone* at 483. Once the pattern had been established, similar orders were entered in response to the applications of 189 of the other A & P contract carriers; however, certain rail carriers objected to these compliance orders as authorizing operations too broad in scope and suggested that the permits, when issued, should authorize the transportation of the commodities described *only* under contracts with "persons who operate retail stores, the chief business of which is the sale of food." *Keystone* at 483. As a result of these objections, on May 20, 1938, the Commission stayed 83 of the 189 compliance orders which had been entered and held a full scale hearing in the *Keystone* case in order to determine whether or not it could and should limit the A & P contract carriers' permits as suggested by the rail carriers.[4] *Keystone* at 476, 483-484.

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[4] The matter was one of considerable doubt because the Commission had previously held that it had no power to restrict the right of a contract carrier to substitute or add contracts within the scope of its permit (a right guaranteed by Section 209(b) of the Motor Carrier Act) by precluding transportation for a shipper other than that with which it had a contract at the time the permit was granted. **Longshore Contract Carrier Application,** 2 M.C.C. 480 (1937).

After considerable debate, the Commission decided that it did have the power to restrict a contract carrier to the transportation of specified commodities for the same class of shipper which it was serving during the grandfather period. *Keystone Transp. Co. Contract Carrier Application*, 19 M.C.C. 475 (1939).

The A & P contract carriers sought reconsideration of the *Keystone* decision, choosing the McAteer application as the test case because it permitted a better exposition of the scope of A & P's operations.[5] *McAteer* at 38. However, the Commission merely reaffirmed its opinion in the *Keystone* case. *McAteer Contract Carrier Application*, 42 M.C.C. 35 (1943).

Application of Andrew G. Nelson

On January 2, 1936, Nelson applied for a contract carrier permit to transport "store fixtures, miscellaneous merchandise and household furniture." (R. 248). His application and supporting documents described his past operation as an interstate carrier under exclusive contract with the Walgreen Company to transport (1) store fixtures, equipment, and miscellaneous merchandise belonging to the Walgreen Company to and from Walgreen retail stores in connection with the opening, closing, and remodeling of stores or, occasionally, in connection with a transfer of stock and (2) household goods belonging to Walgreen Company employees who presumably were being transferred and whose moving expenses were being paid by Walgreen. (R. 247-249, 264-268.)

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[5] McAteer was not one of the 83 A&P contract carriers whose compliance orders were stayed pending the outcome of the **Keystone** case; however, that case was decided before McAteer's permit was issued and clearly indicated that all future permits issued to A&P contract carriers were to contain a Keystone restriction, **i.e.**, a clause limiting the class of shippers which could be served. **McAteer** at 38. Consequently, McAteer was in a position to ask for consideration of his own application as a test case.

On February 14, 1938, the Commission issued a compliance order authorizing the issuance of a permit to Nelson to transport the "commodities indicated" as follows (R. 230-231):

> "*New and used store fixtures, new and used household goods*, and *stock* in trade of drug stores."[6]

On March 13, 1942, the Commision issued to Nelson a permit containing exactly the same commodity authorization as the 1938 compliance order. (R. 232.)

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[6] The Court, in its opinion (note 2), states that neither party attaches any significance to the underscoring of certain words in the commodity description. It was the Commission's usual practice to separate general groupings of commodity descriptions by the use of divided underscoring. **Pierce Auto Freight Lines, Inc., v. Converse**, 54 M.C.C. 447, 451 (1952). The fact that only the word "**stock**" in "**stock** in trade of drug stores" was underscored would appear to support appellant's contention that "**stock**" was a general commodity category and that the added words are merely a limitation by reference to place of sale. **Cf. Interstate Commerce Commission v. Ratner**, 6 Federal Carriers Cases, par. 80,415 (N.D. Ill., April 15, 1947): "**Such merchandise** as is dealt in by wholesale food business houses, and in connection therewith, **equipment**, **materials**, and **supplies** used in the conduct of such business * * *."

ARGUMENT.

I.

BY A MISTAKE WHICH IT HAS NO STATUTORY AUTHORITY TO CORRECT, THE COMMISSION GAVE NELSON A PERMIT WHICH AUTHORIZED THE TRANSPORTATION OF GOODS SUCH AS ARE SOLD IN DRUG STORES WITHOUT RESTRICTION AS TO CONSIGNOR, CONSIGNEE, OR ULTIMATE INTENDED DESTINATION.

A. During the grandfather period, Nelson performed the same function for Walgreen that the A & P contract carriers performed for A & P.

A comparison of the Commission's description of the A & P contract carriers' operations in the *Keystone* and *McAteer* cases with the description of Nelson's operations in his application and supporting documents shows that they were performing exactly the same kind of service for different types of shippers: both transported fixtures, supplies, and miscellaneous merchandise (stock in trade) belonging to the operator of a chain of retail stores (in one case, grocery stores; in the other, drug stores) exclusively for that shipper. Chairman Eastman's description of this intra-mural kind of operation, in the *Keystone* case, also accurately describes Nelson's service for Walgreen (p. 498):[7]

> It serves the peculiar needs of chain-store organizations whose operations are scattered over a wide territory and require a varied and flexible transportation service between warehouses and stores and points of supply which will be as completely under the domination of the management as any other phase of the business.

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[7] A detailed comparison of the operations of Nelson and the A&P contract carriers is contained in the Appendix, infra.

B. In the compliance orders issued to Nelson and the A & P contract carriers, the Commission merely used different language to describe their identical functions, and did not intend the issuance of permits authorizing different future operations.

The Commission was required, by the grandfather clause of the Motor Carrier Act, to grant to qualified applicants substantial parity between pre-regulation and post-regulation operations. *Alton R. Co.* v. *United States.* 315 U.S. 15 (1942). First, the Commission had to determine what the applicant's grandfather operations consisted of—and this was done by a finding incorporated in Nelson's and the A & P contract carriers' compliance orders, which were issued about the same time.[8] Having comparable operations to define, the Commission used the following language to describe the commodities transported (*Keystone* at 482-483; R. 231):

A & P Contract Carriers' Compliance Orders	*Nelson's Compliance Order*
Such merchandise as is dealt in by wholesale, retail, and chain grocery and food business houses and in connection therewith, equipment, materials, and supplies used in the conduct of such business.	*New and used store fixtures, new and used household goods,* and *stock* in trade of drug stores.

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[8] The compliance order of one of the A&P contract carriers (McAteer) was issued on the same day as Nelson's: February 14, 1938. (**McAteer** at 36; R. 215,230.) At least 189 similar compliance orders were issued to A&P contract carriers between the time the pattern was established by Jones' amended order (November 29, 1937) and the time the Commission stayed 83 of the orders pending the outcome of the **Keystone** case (May 20, 1938). **Keystone** at 476, 483-484.

There is no sure way of knowing why the Commission used different language to describe similar operations. However, we believe the explanation is to be found in the fact that the Commission had not, at this early stage, developed stereotyped phrases having well established connotations; rather, the Commission simply followed the practice of adopting, wherever possible, the commodity descriptions used by carriers in their applications.[9] *Eclipse Motor Lines, Inc., Interpretation of Certificate*, 52 M.C.C. 391 (1951). The A & P contract carriers applied for permits to transport "such commodities * * * as are merchandised * * * by the Great Atlantic and Pacific Tea Company" (*McAteer* at 36)[10]; their compliance orders authorized the transportation of "Such merchandise as is dealt in by * * * grocery and food business houses" (*Keystone* at 483). The similarity is obvious. Nelson applied for a permit to transport "miscellaneous merchandise" (R. 247-248); his compliance order authorized the transportation of "*stock* in trade of drug stores" (R. 232). Obviously, the Commission refused to adopt the language of Nelson's application because it would have resulted in a general commodity authorization; instead, the Commission limited the authorized range of commodities by reference to the kind of stores where they are stocked for sale to customers.[11]

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[9] The Commission later came to regret this practice (**Descriptions in Motor Carrier Certificates,** 61 M.C.C. 209, 211 (1952)):

> In the determination of the operating rights of the large number of motor carriers under the 'grandfather' clause of the act, we unwittingly created some of our present difficulties. In the issuance of 'grandfather' certificates to special commodity carriers we were governed in some instances by the terminologies used by the parties in describing the commodities or class of commodities they had transported. Therefore, some of the uncertainties and ambiguities and difficulties of enforcement arise from the inept choice of generic terms used in filing applications for operating authority and carried forward into the certificates.

[10] Inasmuch as the Company assisted all of the A&P contract carriers in filing their applications and inasmuch as all were performing the same kind of service for A&P, we can assume that McAteer's application was typical. **Keystone** at 482.

Regardless of the manner in which the Commission arrived at its choice of language to describe the commodities transported by Nelson and the A & P contract carriers during the grandfather period, one thing is certain: neither phrase had acquired any special meaning at the time and there is no reason to believe that, in describing parallel operations, the Commission intended to authorize the issuance of a more restricted permit to Nelson than to the A & P contract carriers. This conclusion is supported by the fact that the Commission described the phase of the A & P contract carriers' operations covered by the "such merchandise as is dealt in by" language of their compliance orders as follows (*McAteer* at 45):

> Naturally, the *stock in trade of A & P stores*, particularly groceries, fruits and vegetables, meats, dairy products, sea foods, beverages, and miscellaneous small household items, has composed the bulk of his [McAteer's] traffic. (Italics supplied.)

This use of the phrase is significant because it is the only case we know of in which the Commission gave any inkling as to the way in which it understood the phrase "*stock* in trade" and because the A & P contract carriers were performing the same type of service as Nelson.

Considering the situation as it existed when Nelson's and the A & P contract carriers' compliance orders were granted, the Commission could not have intended to describe different operations by the phrases "*stock* in trade of" and "Such merchandise as is dealt in by."

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[11] The word "stock" was very likely taken from the statement submitted by Nelson in connection with his application. He stated that he usually carried to Walgreen's retail stores "store fixtures and equipment and merchandise for the opening **stock**" and that his equipment usually returned empty except for "old store fixtures and equipment and occasionally a transfer of **stock**." (R. 264; boldface supplied.)

C. Nelson's permit, like those issued to the A & P contract carriers, should have contained a Keystone restriction, but, by mistake, none was inserted.

We have shown that the compliance orders granted to Nelson and the A & P contract carriers must have been intended to describe and authorize transportation of the same broad range of general commodities, limited only by reference to the kinds of stores where they are stocked for sale to customers. Such transportation was broader than that which the A & P contract carriers had engaged in during the grandfather period because they had transported only for A & P and had transported only commodities owned by A & P. In order not to authorize transportation broader than was justified by their grandfather operations, the Commission found it necessary to invent the Keystone restriction. As Commissioner Eastman said in the *Keystone* case (p. 499):

> [The A & P contract carriers' service] is of a distinct type which is linked and interlocked with the operations of a definite class of shippers. *I know of no way to define it closely and accurately except by reference to that class of shippers.* (Italics supplied.)

Likewise, since Nelson was performing exactly the same kind of service for Walgreen, only a Keystone restriction would have closely and accurately described his grandfather operations. However, no Keystone restriction was imposed—even though his permit was issued in 1942, long after the Keystone restriction had been invented in 1939. (R. 232.) Instead, his permit contained exactly the same commodity description as his pre-Keystone 1938 compliance order.

The only conclusion to be drawn is that the Commission inadvertently failed to include a Keystone restriction in

Nelson's permit; for the record before the Commission at the time clearly indicated that such a restriction was appropriate.[12]

D. Nelson acquired the kind of broad, unrestricted commodity authorization which prompted the Commission to impose Keystone restrictions on the A & P contract carriers and such authorization cannot now be modified by interpretation.

We have shown that the phrase "*stock* in trade of drug stores", used in Nelson's 1938 compliance order and carried over into his 1942 permit without the superimposition of Keystone restriction, authorizes the same transportation as the A & P contract carriers could have engaged in, absent a Keystone restriction. Chairman Eastman described that transportation as follows (*Keystone* at 500):

> * * * * if a contract carrier were authorized to transport such merchandise as is dealt in by a large mercantile concern * * *, it could enter into a contract or contracts with any shipper or concern to transport any one or all of the commodities coming within such commodity description and moving within the territorial limitations of its permit.

Once a permit is issued, even though it mistakenly authorizes operations broader than warranted by the underlying grandfather operations, it can be revoked or modified only as provided by Congress; and there is no statutory authority under which the Commission may now correct (by interpretation or otherwise) its mistake in issuing Nelson's permit. Motor Carrier Act, Sec. 212(a) (49 U.S.C. 1952 ed., Sec. 312(a); *United States* v. *Seatrain Lines*, 329 U.S. 424; *Coastal Tank Lines, Inc.*, v. *Charlton Bros. Transp. Co., Inc.*, 48 M.C.C. 289, 392 (1948); *Atlantic Freight Lines, Inc.—Petition for Declaratory Order*, 51 *Frt. Lines, Inc.—Petition for Declaratory Order*, 51 M.C.C. 175, 191 (1949); *Vidas Contract Carrier Application*, 62 M.C.C. 106, 107 (1953).

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[12] Inasmuch as the Court has held that evidence of grandfather operations broader in scope than those reflected in Nelson's application and supporting documents can be appropriately utilized only in a connection with a petition to reopen the grandfather proceeding, appellant's argument here assumes, throughout, that Nelson was hauling only for Walgreen.

II.

THE COURT'S REASONS FOR UPHOLDING THE COMMISSION'S RESTRICTIVE INTERPRETATION ARE FOUNDED UPON ERRONEOUS FACTS

A. "Stock in trade of drug stores", as used in Appellant's permit, does not connote possession.

Both Nelson and the A & P contract carriers were transporting commodities which "belonged to" their respective customers in the sense that the shippers owned the goods at the time of transportation. (R. 38, 265-266; *McAteer*, at 39-40.) Therefore, if "*stock* in trade of" connotes possession, so should "such merchandise as is dealt in by"—and yet the phrase has never been so interpreted.

Furthermore, if "*stock* in trade of" connotes possession and means the same as "drug stores' stock," as the Court has held, appellant should logically be restricted to transporting stock already owned by a drug store at the time of transportation—and yet not even the Commission goes so far. The Commission would permit appellant to transport not only such goods as are, at the time of transportation, part of the stock in trade of a drug store, but also such goods as are "intended to become [,] part of the stock in trade of a drug store." 63 M.C.C. 407, 411. Therefore, if the phrase "*stock* in trade of drug stores" meant to the Commission which issued Nelson's compliance order (1938) and permit (1942) what the Commission today says it means, that Commission knowingly granted to Nelson a commodity authorization broader than he was entitled to receive on the basis of his grandfather operations as reflected in the record before the Commission. We believe it is more logical to conclude that the Commission mistakenly issued the 1942 permit using the language of the 1938 compliance order, without reviewing the application in the light of the intervening *Keystone* decision.

"*Stock* in trade of drug stores," as now interpreted by the Commission, would not have accurately defined Nelson's transportation for Walgreen; only the addition of a Keystone restriction would have accomplished that. However, when the phrase was first used, in the 1938 compliance order, the Commission's right to impose such a restriction had not been established and the Commission was issuing compliance orders containing a broad commodity description with no possessive connotation and without a Keystone restriction to the A & P contract carriers whose grandfather operations were the same as Nelson's. Therefore, even if it could be said that the phrase "*stock* in trade of" connotes possession in its ordinary usage, it seems clear that it was not used in that sense by the Commission which issued Nelson's compliance order and permit.

B. No significance may be attached to the Commission's failure to use the phrase "such merchandise as is dealt in by" (or comparable language) in Nelson's permit.

The Court points out that the Commission has usually used the phrase "such as" or a close variation thereof to indicate a generic description of commodities by reference to place of sale. This is certainly not surprising, considering that the phrase became so well known as a result of the 600 A & P contract carrier applications and the *Keystone* and *McAteer* cases. The phrase "*stock* in trade of" did not become so famous or so deeply imbedded in the Commission's commodity description glossary because it was not involved in any volume of cases; in fact, Nelson's compliance order and permit are the only ones we have been able to find in which the phrase was used. It certainly adds no strength to the Commission's position to point out that a phrase like "such merchandise as is dealt in by" has, over the years, taken on the significance of a term of art; the question at issue in this case is what was meant when Nelson's compliance order and permit were issued containing the phrase "*stock* in trade of drug stores" and we have shown that the phrase was intended to describe the same transportation as the "Such merchandise as is dealt in" phrase in the A & P contract carriers' permits.

Perhaps the most astounding thing about this case is to find the Commission arguing (and the Court agreeing) that if Nelson's permit read "such merchandise as is dealt in by drug stores", rather than "*stock* in trade of drug stores", the Commission's interpretation of appellant's permit would be erroneous. In *Interstate Commerce Commission* v. *Ratner*, 6 Federal Carriers Cases, par. 80,415 (N.D. Ill. April 15, 1947), the Commission sought to establish that implicit in a "such merchandise as is dealt in by" commodity description was exactly the same kind of limitation which it now seeks to read into appellant's permit. Significantly, Ratner's contract carrier permit, like Nelson's, was issued in 1942 without a keystone restriction.[13] The Commission's attempt to restrict the scope of Ratner's permit was unsuccessful and, ever since, in its own decisions, the Commission has held that a "such merchandise as is dealt in by" (or similar) commodity description is nothing more than a generic commodity description by reference to place of sale. *Sanders Extension of Operations—Washington, D. C.*, 47 M.C.C. 210 (1947); *National Trucking Co., Inc., Ext.—Electrical Appliances*, 51 M.C.C. 638. (1950); *Vidas Contract Carrier Application*, 62 M.C.C. 106 (1953).

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[13] In **Dart Transit Co.—Modification of Permit**, 49 M.C.C. 607, 612 (1949), the Commission pointed out the distinction between a commodity description by reference to (1) intended use and (2) places where such commodities are dealt in and stated that the latter "are ordinarily made only to contract carriers **and are coupled** with a so-called Keystone restriction as to the type of shipper for which service may be rendered * * *." (Boldface supplied.) Therefore, the issuance of Ratner's permit without a Keystone restriction was a mistake which the Commission was trying to correct by interpretation.

We have already shown that the Commission's choice of (1) "such merchandise as is dealt in by" to describe the A & P contract carriers' grandfather operations and (2) "*stock* in trade of" to describe Nelson's grandfather operations was based primarily upon language used in their respective applications and certainly was not intended to describe different operations because their operations were the same. We have also shown that, if the two phrases were intended to mean what the Commission now says they meant, (1) the Commission wrongly attacked Ratner's permit in 1947 and (2) the Commission which issued Nelson's permit in 1942 deliberately granted an operating authority broader than he was entitled to receive. We submit that no significance can be attached to the difference in language chosen to describe the same kind of operations, and that the only logical explanation of the Commission's attacks upon Ratner and appellant is that the Commission is trying to correct, under the guise of interpretation and without statutory authority, its early mistakes in issuing permits containing commodity descriptions by reference to place of sale without Keystone restrictions.

CONCLUSION.

Over the years the Commission has waged unceasing war against contract motor carriers—particularly those with grandfather rights broader than could be obtained under the Commission's current policies. The Commission achieved a major victory when it successfully established, in the *Dart Transit Co.* and similar cases, that inherent in a commodity description such as "packing house supplies" was not only the obvious limitation that the supplies referred to must be such as are customarily used by packing houses, but also the further implied limitation that the supplies must be destined for use by a packing house. The Commission sustained a major defeat when it unsuccessfully attempted to impose the same kind of limitation on a "such merchandise as is dealt in by" commodity description in the *Ratner* case. However, if this Court's decision is allowed to stand, the Commission will have accomplished here what it failed to accomplish in the *Ratner* case because the language of appellant's permit, when viewed in historical perspective, cannot have been intended to mean something different from a "such merchandise as is dealt in by" commodity description. We do not believe the Court should sanction this further extension, using reasons which are demonstratively specious from an historical and analytical standpoint.

It may seem that the commodity authorization contended for by appellant is somewhat broad; however, it does contain the inherent limitation that the commodities must be such as are customarily stocked by drug stores and it is no more than appellant is entitled to, because of the Commission's mistake in failing to insert a Keystone restriction in Nelson's permit. The danger of permitting the Commission to correct such mistakes by subsequently developed subtleties of interpretation, contrary to the statutory prohobition, far outweighs the danger of one carrier operating under an unusually favorable permit.

For these reasons, appellant respectfully requests a rehearing of this case.

Respectfully submitted,

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March, 1958

Certificate of Counsel.

I hereby certify that this petition is presented in good faith and not for purposes of delay.

....
Victor L. Lewis

APPENDIX

The similarity between the grandfather operations of the Nelson and the A&P contract carriers is pointed up by the following:

1. Both restricted themselves to the service of one shipper:

   (a) the A&P carriers "devote themselves, or at least certain equipment which is prominently marked with A&P's name, to its service exclusively." *McAteer* at 39.

   (b) Nelson "is an interstate contract carrier of property for the Walgreen Company and for it alone." (R. 264.)

2. Both were required to transport anything, anywhere (within the local territory served by the distribution unit), anytime, as directed by the shipper served:

   (a) McAteer's truck "was placed at the unqualified beck and call of A&P and made available to haul anything, any place, any time, as directed by A&P." *McAteer* at 40.

   (b) Nelson testified that he "transported, wherever they [his customers, including Walgreen] wanted me to and under any condition." (R. 84.) He was registered with the NRA as an "ANYWHERE FOR HIRE Member of the Trucking Industry." (R. 229.)

3. The commodities transported all belonged to the shipper served:

   (a) "The commodities transported [by the A&P contract carriers] * * * moved from rail and water carrier terminals or the establishments of independent suppliers to the plants and warehouses of A&P subsidiaries and departments, or directly to retail stores, also between such plants, warehouses, and retail stores." *McAteer* at 40. "A&P contract carriers also transport in-bound merchandise, supplies, and equipment from the plants of wholly independent producers or jobbers. If goods are purchased f.o.b. destination, neither A&P nor any of its carriers has anything to do with the transportation thereof, but if, as is frequently the case, purchases are made f.o.b. origin the transportation is performed by an A&P carrier for A&P." *McAteer* at 39-40.

(b) Nelson transported "store fixtures, miscellaneous merchandise and household goods belonging to Walgreen Company or their employees, * * *." (R. 265-266.)

4. Both transported a wide range of commodities, generally described as store fixtures and supplies and miscellaneous merchandise for the stock:

(a) "The commodities transported [by McAteer] varied greatly. * * * On some occasions, he hauled straight loads of a single commodity; on others, mixed loads of miscellaneous merchandise. On return from distribution trips to retail stores and on other occasions, various commodities were regularly transported to A&P salvaging, reconditioning, or processing plants." *McAteer* at 40. "Naturally, the stock in trade of A&P stores * * * has composed the bulk of his traffic. There also has been transported, however, a substantial volume of miscellaneous store and plant supplies, equipment, laundry, salvaged material * * *, and empty containers * * *." *McAteer* at 45-46.

(b) Nelson transported "store fixtures, miscellaneous merchandise and household goods belonging to Walgreen Company or their employees, in connection with the opening, closing and remodeling of stores * * *." (R. 265-266). "* * ** the commodities so transported [by Nelson for Walgreen] are usually store fixtures and equipment and merchandise for the opening stock. * * * his equipment usually returns empty, except for old store fixtures and equipment and occasionally a transfer of stock for Walgreen Company." (R. 264.)

5. Both operated, at first, under oral agreement with their respective shippers, but later, after motor carrier regulation commenced, reduced his agreement to writing—and many of the contractual provisions are similar. (*McAteer* at 41: R. 247, 270.)